Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

GABE KERI, *Petitioner,*

v.

BOARD OF TRUSTEES OF PURDUE UNIVERSITY, *et al.*, *Respondents*

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a court of appeals must weigh all of the evidence or consider only the evidence favoring a district court's findings when conducting a *de novo* review of a grant of summary judgment under Federal Rule of Civil Procedure 56.

II. Whether an employer's violation of its own policies and procedures in taking adverse employment action against an employee raises an inference of pretext.

III. Whether *McDonnell Douglas Corp. v. Green* requires that similarly situated individuals who are treated more favorably must be accused of the same or similar conduct.

IV. Whether evidence of alleged misconduct of an employee acquired after the employer has taken adverse employment action may be considered.

TABLE OF CONTENTS

Questions Presented	i
Table of Authorities	iii
Table of Appendices	v
Opinions Below	1
Jurisdiction	1
Relevant Provisions	1
Statement of the Case	2
Reasons for Granting the Writ	8
Conclusion	19

TABLE OF AUTHORITIES

Cases

Adreani v. First Colonial Bankshares Corp.,
154 F.3d 389 (7th Cir. 1998) 15

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 8, 10

Blow v. City of San Antonio,
236 F.3d 293 (5th Cir. 2001) 9, 12

Collier v. Budd Co.,
66 F.3d 886 (7th Cir. 1995) 16

Conward v. The Cambridge School Committee,
171 F.3d 12 (1st Cir. 1999) 17

Dartmouth Review v. Dartmouth College,
889 F.2d 13 (1st Cir. 1989) 18

Dey v. Colt Constr. & Dev. Co.,
28 F.3d 1446 (7th Cir. 1994) 16

English v. Colorado Dept. of Corrections,
248 F.3d 1002 (10th Cir. 2001) 14

Flores v. Preferred Technical Group,
182 F.3d 512 (7th Cir. 1999) 15

Freeman v. Madison Metropolitan School District,
231 F.3d 374 (7th Cir. 2000) 9

Gordon v. United Airlines, Inc.,
246 F.3d 878 (7th Cir. 2001) 15

King v. Palmer,
778 F.2d 878 (D.C. Cir. 1985) 11

Mardell v. Harleysville Life Ins. Co.,
31 F.3d 1221 (3rd Cir. 1994) 19

McDonald v. Santa Fe Trail Transp. Co.,
427 U.S. 273 (1976) 16,17,18

McKennon v. Nashville Banner Publishing Company,
513 U.S. 352 (1995) 18

O'Neal v. City of New Albany,
293 F.3d 998 (7th Cir. 2002) 19

Odima v. Westin Tucson Hotel,
53 F.3d 1484 (9th Cir. 1994) 14

Payne v. Milwaukee County,
146 F.3d 430 (7th Cir. 1998) 9

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 8,12,14

Santi v. CNA Insurance Co., et al.,
88 F.3d 192 (3rd Cir. 1996) 19

Schoenfeld v. Babbitt,
168 F.3d 1257 (11th Cir. 1999) 15

Stern v. Trustees of Columbia University,
131 F.3d 305 (2nd Cir. 1997) 12

Stimpson v. City of Tuscaloosa,
186 F.3d 1328 (11th Cir. 1999) 15

Townsend v. Wash. Metro. Area Transit Auth.,

746 F.Supp. 178 (D.C. Cir. 1990) 11

Willis v. Marion County Auditor's Office,
118 F.3d 542 (11th Cir. 1999) 15

Zahorik v. Cornell University,
729 F.2d 85 (2nd Cir. 1984) 12

Statutes

28 U.S.C § 1254(1) 1

Federal Rule of Civil Procedure 56 1, 9

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 1

42 U.S.C. §§ 1981, 1985(3), and 1986 5

TABLE OF APPENDICES

Appendix A—Opinion of the United States Court of Appeals for the Seventh Circuit Dated and Decided on August 14, 2006. 1a

Appendix B—Opinion of the United States District Court for the Northern District of Indiana Dated and Filed on November 9, 2005. 5a

OPINIONS BELOW

The opinion of the Seventh Circuit, which is reported at *Keri v. Bd. of Trustees of Purdue Univ., et al.*, 458 F.3d 620 (7th Cir. 2006), is reproduced in the Appendix at App. A. The November 9, 2005, opinion of the District Court, which is reported at *Keri v. Bd. of Trustees of Purdue Univ., et al.*, 2005 U.S. Dist. LEXIS 43183; 98 Fair Empl. Prac. Cas. (BNA) 1273, is reproduced in the Appendix at App. B.

JURISDICTION

The decision of the Court of Appeals was entered on August 14, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The statute construed is Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, which states: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Federal Rule of Civil Procedure 56 provides in relevant part that summary judgment should be granted "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c).

STATEMENT OF THE CASE

A. Statement of Facts

The facts are drawn from the Petitioner's Brief filed on his behalf in the Seventh Circuit Appeal and are as follows: Dr. Gabe Keri, a black male of Ghanian descent, began his employment as an Associate Professor and was hired as Coordinator of the Counseling Program in the School of Education (SOE) at Indiana University-Purdue University Fort Wayne (IPFW). The Dean of the SOE, Dr. Roberta Wiener, made the offer of employment to Dr. Keri. IPFW's track toward tenure has three (3) criteria for promotion and tenure: teaching, research, and service. Tenure is satisfactory in all three (3), while promotion is to excel in one (1). The SOE is made up of two (2) chairs, Dr. William Utesch and Dr. Kathleen Murphey, who are supervised by Dean Roberta Wiener. The procedure mandated by IPFW for promotion of an associate professor with tenure-track is as follows: 1) the Chair makes his/her recommendation for reappointment; 2) the Dean makes her recommendation for reappointment; 3) the Vice-Chancellor for Academic Affairs, Dr. Susan Hannah, makes her recommendation for reappointment based upon the Chair's and Dean's recommendations; and 4) the Chancellor of IPFW, Dr. Michael Wartell, makes his recommendation for reappointment based upon the aforementioned recommendations.

Dr. Keri was unanimously reappointed for the 2001-2002, 2002-2003, and 2003-2004 academic years, respectively. Subsequently, Dr. Keri raised a concern regarding the lack of minority students being admitted to the graduate program in the SOE with Dr. Utesch. In response, Dr. Utesch began to berate Dr. Keri with

inappropriate comments about minorities, such as "minority students, particularly females, are uncomfortable to deal with because they are quick to invoke the notions of a lawsuit," and "You are of African descent; you really don't know, Gabe." In addition, Dr. Utesch mistreated Dr. Keri by shouting at him and physically grabbing telephones from Dr. Keri's hand.

When Dr. Keri came up for reappointment for the 2004-2005 academic year, a Peer Review Committee (PRC) of the SOE conducted a review of Dr. Keri's teaching, research, and service. The PRC unanimously gave a favorable recommendation of Dr. Keri. Prior to Dr. Utesch making his recommendation and contrary to IPFW's procedures, on February 2, 2003, Dean Wiener recommended the reappointment of Dr. Keri while indicating problems between Dr. Keri and Dr. Utesch. Subsequently, on March 31, 2003, Dr. Utesch signed a letter against Dr. Keri's reappointment citing that "ongoing student complaints have become more serious." Dr. Utesch testified that there were no written complaints from students because "they were afraid of retaliation." However, IPFW has a strong policy against retaliation. On April 3, 2003, Vice-Chancellor Hannah and Chancellor Wartell endorsed Dr. Utesch's recommendation and declined the reappointment of Dr. Keri.

Dr. Keri presented materials and sought review of Dr. Hannah's decision at a meeting in which two (2) other tenured faculty members, Dr. Gail Hickey and Dr. Rick Ramsey, accompanied Dr. Keri to support him. Dr. Hickey testified that Dr. Hannah was not willing to look at any documentation Dr. Keri had brought and was further unwilling to reveal the source of the alleged student complaints cited by Dr. Utesch. Dr. Hickey further testified that Dr. Hannah said, "If you don't leave the campus, we will take appropriate measures

against you." Inevitably, Dr. Hannah refused to overturn her decision not to reappoint Dr. Keri. Dr. Keri invited Chancellor Wartell to write a response concerning his decision, but Wartell did not respond.

Subsequently, on May 12, 2003, two (2) female students, Suzanne Swinehart and Virginia Hartman, filed formal complaints against Dr. Keri alleging sexual harassment. IPFW has a policy requiring that complaints of sexual harassment must be reported within 120 days of the alleged harassment. These complaints were investigated by Dr. Elaine Blakemore, who issued a report on June 30, 2003, in which she wrote as follows: "Many events reported took place outside of the 120-day limit." Despite the latter, Dr. Blakemore states she spoke to a cohort of current and former students of Dr. Keri who had complaints similar to those of Hartman and Swinehart alleging that Dr. Keri engaged in excessive discussion about sexuality before the entire class. Again, however, Dr. Blakemore failed to identify specifically who these students were citing fear of retaliation, regardless of the fact that such retaliation is against IPFW policy. Moreover, Virginia Hartman testified that she, Dr. Utesch, and Swinehart all met and discussed Dr. Keri at the Summit City Racquet Club and sometimes in the hallway. Such conduct is also contrary to IPFW's policies and procedures. Nevertheless, Dr. Blakemore concluded that Hartman and Swinehart experienced a hostile educational environment as opposed to their alleged sexual harassment. As a result, Dr. Keri was banished from the IPFW campus and forbidden from teaching any further classes.

Dr. Gail Hickey further testified that Dr. Keri's performance was comparable to other non-minority faculty members, both tenured and non-tenured. She testified that when Dr. Utesch, himself, came up for promotion, the Campus Committee voted 6-0 against

his tenure; however, in spite of these negative votes and not one positive vote, Chancellor Wartell granted Dr. Utesch tenure. In addition, around December 2, 1999, and May 22, 1997, a number of students signed petitions against Dr. Hickey and Dr. Sheena Choi, who was also an Associate Professor in the SOE. These respective students were complaining of what they believed was poor teaching by Dr. Hickey and Dr. Choi. These students were not afraid of retaliation and, in fact, were willing to sign their names on the petitions. Dr. Choi was also accused of plagiarism on her doctoral dissertation. Unlike Dr. Keri, these professors continue to be members of the faculty of the SOE at IPFW.

B. Course of Proceedings Below

On June 10, 2004, Petitioner filed a Complaint in the United States District Court for the Northern District of Indiana where Dr. Keri resides. The action was brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981, 1985(3), and 1986. On April 7, 2005, Respondent filed its motion for summary judgment. On May 28, 2005, Petitioner filed his opposition to Respondent's motion for summary judgment. With his response to Respondent's motion for summary judgment, Petitioner presented a significant amount of evidence, including the affidavits of ten (10) former students praising him as a dedicated and qualified teacher and a person of integrity. On June 10, 2005, Respondent filed its reply brief and contemporaneously submitted a motion to strike certain designated evidence. On July 25, 2005, the District Court announced its intent to grant in part and deny in part Respondent's Rule 56 motion to strike certain designated evidentiary material, and its intent to grant Respondent's motion for summary judgment. On August 25, 2005, Petitioner filed his Notice of Appeal and Docketing Statement with the district, which was

docketed in the U.S. Court of Appeals for the Seventh Circuit on September 7, 2005. On September 14, 2005, the Court of Appeals issued an order that Petitioner, on or before September 26, 2005, file a brief memorandum stating why the appeal should not be dismissed for lack of jurisdiction. The order also stated that a motion for voluntary dismissal pursuant to Fed.R.App.P. 42(b) would satisfy the latter requirement. On September 19, 2005, Petitioner filed his Motion to Clarify Court's Preliminary Ruling with the District Court. On September 23, 2005, Petitioner and Respondent filed a joint Stipulation of Dismissal with the Court of Appeals pursuant to the order of September 14, 2005. On November 9, 2005, the District Court issued a formal opinion and order granting Respondent's motion for summary judgment.

The District Court analyzed the summary judgment evidence under the *McDonnell Douglas* indirect method to determine whether Petitioner established a prima facie case of race and/or national origin discrimination. It held that Petitioner had established the first and third prongs of the prima facie case, however, Petitioner failed to establish the second and fourth prongs. Specifically, the District Court held that Petitioner failed to prove that he was meeting Respondent's legitimate expectations and that similarly situated others received more favorable treatment than Petitioner. The District Court considered these two (2) prongs together with Petitioner's claims that the Respondent's reasons for Petitioner's non-reappointment were pretext.

With regard to the issue of similarly situated, the District Court found that Petitioner had identified seventeen (17) current and former employees of Respondent, both tenured and non-tenured; however, the District Court held that they were not directly comparable to Petitioner in all material respects. It held

that the similarities of which Petitioner spoke related only to his ability to teach, write, and research. It also held that the advancement of the tenured members did not take place at the same time that Petitioner was not reappointed. Finally, it held that Petitioner had not shown similarities as to the status of these individuals or any detrimental conduct, similar to his own, that they were accused of. The District Court further ruled that Petitioner was not a tenured professor and was subject to different standards than the tenured ones.

As for the issue of pretext, the District Court ruled that Petitioner had failed to present enough evidence to cast the shadow of pretext on Respondent's explanation why he was not reappointed. It held that Petitioner did not provide the Court with a reason to believe that Dr. Hannah or Dr. Utesch simply made up the stories of the students' complaints, by themselves or in collaboration with the students. The District Court discounted Dr. Utesch's remarks about minorities and held as follows: "As such, even if considered in the light most favorable to the Plaintiff, the statements do not support an inference that Dr. Utesch or Dr. Hannah made their recommendations to not reappoint the Plaintiff for any improper reason. Similarly, Dr. Utesh's undated statement that 'minority students, particularly females, are uncomfortable to deal with because they are quick to invoke the notions of a lawsuit' is too obscure to demonstrate pretext in the Defendant's stated reason for the Plaintiff's non-reappointment." Finally, the District Court found that since Dr. Utesch was instrumental in both hiring and firing Petitioner, an inference against discrimination on his part, even if limited, exists.

Petitioner appealed the summary judgment ruling to the Seventh Circuit seeking a *de novo* review of the District Court's findings. Citing Rule 56(c) of the Federal Rules of Civil Procedure, recent case law

from this Court and the Seventh Circuit, he contended that the District Court erred in excluding certain relevant evidence from the record and that there was sufficient designated evidence to defeat Respondent's motion for summary judgment.

The Seventh Circuit affirmed summary judgment in favor of Respondent in a 4-page opinion in which it adopted the District Court's order. It found that there was a lack of evidence that Petitioner was meeting the legitimate expectations of Respondent and of similarly situated employees who were treated more favorably.

REASONS FOR GRANTING THE WRIT

I. Whether a court of appeals must weigh all of the evidence or consider only the evidence favoring a district court's findings when conducting a *de novo* review of a grant of summary judgment under Federal Rule of Civil Procedure 56.

In affirming summary judgment, the Seventh Circuit did not weigh all of the evidence and considered only the evidence favoring the District Court's findings. As such, the Seventh Circuit misapplied the standard of review dictated by the Supreme Court with regard to *de novo* review for summary judgment.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court held that the appropriate standard of review of a lower court's granting of summary judgment pursuant to Rule 56 mirrors the standard for reviewing a judgment as a matter of law under Rule 50. "[T]hus, the court must review all of the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence. The latter functions, along with the

drawing of legitimate inferences from the facts, are for the jury, not the court." *Id.* [citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)]. "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.*

The Fifth Circuit ~~provided a el~~ear articulation of the standard of review in a Title VII case when a district court has granted a motion for summary judgment in the case of *Blow v. City of San Antonio*, 236 F.3d 293, 296 (5th Cir. 2001):

> "Summary judgment is appropriate only if the full record discloses 'no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law.'"

Id. [citing Fed.R.Civ.P. 56]

> "When a district court has granted a motion for summary judgment, we review the question *de novo*, applying the same substantive test set forth in Rule 56. In reviewing the record as a whole, we view allfacts in the light most favorable to the non-moving party and do not defer to any factual assumptions the district court has apparently made."

Id. [citation omitted]

The Seventh Circuit itself has held previously in the case of *Freeman v. Madison Metropolitan School District,* 231 F.3d 374, 379 (7th Cir. 2000), that in the course of a *de novo* review, it must consider the evidence in the light most favorable to the non-moving party to determine whether there is no legally sufficient basis for a reasonable jury to find for the non-moving party. *Id.* [citing *Payne v. Milwaukee County*, 146 F.3d

430, 432 (7th Cir. 1998)]. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Id.* [quoting *Anderson*, 477 U.S. 255].

In the present case, Petitioner presented abundant evidence, which raised numerous issues of material fact, that the Court of Appeals did not consider in the course of its *de novo* review of the District Court's decision. Moreover, the Court of Appeals, as well as the District Court, took all of Respondent's assertions as factual and clearly appear to draw all reasonable inferences adversely to Petitioner, contrary to the appropriate standard of review. Finally, the Court of Appeals did not even address the District Court's exclusion of statements of IPFW officials and faculty members relied upon by Petitioner. Such failure clearly indicates that the Court of Appeals did not conduct an actual *de novo* review of the entire record before it.

II. Whether an employer's violation of its own policies and procedures in taking adverse employment action against an employee raises an inference of pretext.

The abundance of evidence put forth by Petitioner showing that Respondent acted in violation of its own policies and procedures in taking adverse employment action against Petitioner was clearly sufficient for a jury to find pretext. The District Court held that Petitioner had failed to present enough evidence to cast the shadow of pretext on the Respondent's explanation why he was not reappointed because he did not produce evidence suggesting racial animus on the part of Dr. Utesch or Dr. Hannah.

The D.C., Second, Fifth, Ninth, Tenth, and Eleventh Circuits, as well as previous decisions of the Seventh Circuit, have articulated different standards for inferring pretext when an employer deviates from its own policies and procedures. The Court of Appeals decision in this case conflicts with these Circuits, as well as its own precedence, with regard to this issue. The Court of Appeals, as well as the District Court, firmly held that they would not second-guess Respondent's legitimate business reason and will not assume the role of a super personnel department, regardless of whether Respondent violated its own policies and procedures.

The D.C. Circuit provided very eloquent language on this issue in the case of *Townsend v. Washington Metropolitan Area Transit Authority,* 746 F.Supp. 178 (D.C. Cir. 1990). In *Townsend*, a female plaintiff brought a claim for gender discrimination after the defendant employer significantly deviated from its established policies and procedures in promoting two (2) less-qualified males over plaintiff. The D.C. Circuit ruled in favor of the plaintiff as follows:

> "The Court holds that this record contains so many unexplained inconsistencies, irregularities, and holes that the Court simply cannot believe [Defendant's] proffered legitimate, discriminatory reasons."

Id. at 184 [citing *King v. Palmer,* 778 F.2d 878, 881 (D.C. Cir. 1985)].

> "Although each one of these flaws may be too small—in and of itself—to discredit [Defendant's] reasons for not promoting the

> plaintiff, when the cracks appear together at the same time the dam of [Defendant's] explanations bursts and the water drowns out [Defendant's] protestations."

Id.

In the case of *Stern v. Trustees of Columbia University*, 131 F.3d 305 (2nd Cir. 1997), the Second Circuit concurred that they do not second-guess an employer's hiring standards or employment decisions; however, it also held that it is not required to focus solely on the reasons given by the employer for its employment decisions in determining pretext. "While we do not second-guess an employer's hiring standards, the reasons for its employment decision, including its alleged reliance on such standards, are subject to scrutiny under Title VII, and 'departures from procedural regularity,' for example, 'can raise a question as to the good faith of the process where the departure may reasonably affect the decision.'" *Id.* [quoting *Zahorik v. Cornell University*, 729 F.2d 85, 93 (2nd Cir. 1984)]. The facts in *Stern* involved a minority professor who was denied for a director position and brought a Title VII claim against the defendant university. The plaintiff submitted evidence that the University deviated from its own prescribed practices in seeking to fill the director position. The plaintiff also pointed out that in seeking to fill the position, the University had more than once deviated from its normal procedures. The deviations included an early attempt to appoint another less-qualified individual as director without following the University's normal procedures. The Second Circuit found that this evidence permitted a fact-finder to disbelieve the University's employment decision and infer pretext. "The challenged decision was made only after the University had deviated from its normal decision-making procedures." *Id.* at 314.

The Fifth Circuit also addressed this issue in the previously mentioned case of *Blow v. City of San Antonio*, supra. In that case, the plaintiff was an African-American who was passed over for a position in favor of a white male from outside the department in which plaintiff had been employed for thirteen (13) years. The plaintiff presented evidence that the defendant employer failed to publicize the job opening within the department as mandated by Administrative Directive 4.16, an existing policy of the employer. The Fifth Circuit ruled that the latter fact may be interpreted to support the plaintiff's contention that the decision-makers were motivated by some animus toward her. *Id.* at 297. The Fifth Circuit went on to cite the Supreme Court's opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, supra, that a trier of fact may infer the ultimate fact of discrimination from the falsity of the employer's explanation:

> "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive...Such an inference [that the employer is dissembling to cover up a discriminatory purpose] is consistent with the general principle of evidence law that the fact-finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'...Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."

Id. at 297-298.

In summary, the Fifth Circuit held that the defendant employer's intentional and deliberate departure from

stated policies necessarily had the effect of discriminating against the plaintiff. *Id.* at 297.

The Ninth Circuit also upheld a district court's finding of discrimination on the part of a defendant employer in the case of *Odima v. Westin Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1994). In *Odima*, the employer violated numerous policies it had in place when it hired and/or transferred other less-qualified candidates over the plaintiff. For example, according to the defendant's policy, when a transfer request was not granted, that request was considered dead, and the applicant would be required to complete a new application. In contravention of that policy, the employer considered another candidate over the plaintiff. In addition, the employer hired another individual over the plaintiff when the respective individual did not even apply for the position, whereas plaintiff did.

In the case of *English v. Colorado Dept. of Corrections,* 248 F.3d 1002 (10th Cir. 2001), the Tenth Circuit clearly articulated the burden on a plaintiff in a Title VII case with regard to proving pretext:

> "A plaintiff typically makes a showing of pretext in one of three ways: (1) with evidence that the defendant's stated reason for the adverse employment action was false; (2) with evidence that the defendant acted contrary to a written company policy prescribing the action to be taken by the defendant under the circumstances; or (3) with evidence that the defendant acted contrary to an unwritten policy or contrary to company practice when making the adverse employment decision affecting the plaintiff."

Id. at 1009.

In certain cases, the plaintiff's prima facie case, and the inferences that may be drawn therefrom, themselves cast sufficient doubt on a defendant's nondiscriminatory reason to satisfy his burden of showing pretext. *Id.* [citing *Reeves v. Sanderson Plumbing Prod.*, supra]. In the present case, with regard to the District Court's holding that Petitioner has failed to prove animus on the part of Dr. Hannah, the Tenth Circuit again provides the appropriate standard of proof: "...under certain circumstances, a defendant may be held liable for a subordinate employee's prejudice even if the manager lacked discriminatory intent. To recover under this theory, the plaintiff must show 'that the decision-maker followed the biased recommendation of a subordinate without independently investigating the complaint against the employee.'" *Id.* at 1011 [citing *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 548 (7th Cir. 1997)].

The Eleventh Circuit has also ruled that pretext was proven in a Title VII case when the defendant employer breached its own internal policies. *Schoenfeld v. Babbitt*, 168 F.3d 1257 (11th Cir. 1999).

The Seventh Circuit itself applied a different standard regarding the inference of pretext in the case of *Gordon v. United Airlines, Inc.*, 246 F.3d 878 (7th Cir. 2001). In *Gordon*, the Seventh Circuit reasoned that when the sincerity of an employer's asserted reasons for discharging an employee is cast into doubt, a fact-finder could reasonably infer that unlawful discrimination is the true motivation. *Id.* at 889 [citing *Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389, 395 (7th Cir. 1998)]. "Our cases have warned, repeatedly, that we do not sit as a super-personnel department that will second-guess an employer's business decision. However, we need not abandon

good reason and common sense in assessing an employer's actions. Indeed, we have stated that a 'determination of whether a belief is honest is often conflated with analysis of reasonableness.'" *Id.* [quoting *Flores v. Preferred Technical Group,* 182 F.3d 512, 516 (7th Cir. 1999)]. "Our cases therefore have acknowledged that we need not take an employer at its word. For instance, we have held that when an employee provides 'a detailed refutation of events which underlie the employer's negative performance assessment,' the employee demonstrates 'that the employer may not have honestly relied on the identified deficiencies in making its decision.'" *Id.* [quoting *Dey v. Colt Constr. & Dev. Co.,* 28 F.3d 1446, 1460-61 (7th Cir. 1994)]. "Furthermore, 'if the employee offers specific evidence from which the finder of fact may reasonably infer that the proffered reasons do not represent the truth, the case then turns on the credibility of witnesses.'" *Id.* [quoting *Collier v. Budd Co.,* 66 F.3d 886, 893 (7th Cir. 1995)]. "In such circumstances, the employee creates 'a factual issue as to whether the employer's explanation is credible or merely a pretext for discrimination.'" *Id.* [quoting *Dey* at 1461].

III. Whether *McDonnell Douglas Corp. v. Green* requires that similarly situated individuals who are treated more favorably must be accused of the same or similar conduct.

The Court of Appeals and the District Court held that Petitioner failed to identify similarly situated who were treated more favorably because those with whom Petitioner compares himself did not stand accused of the same or similar conduct.

Contrary to the Seventh Circuit's holding in this case, the First, Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, have all adopted the standard articulated by the Supreme Court in the

case of *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S 273 (1976), in which two (2) white employees were discharged for misappropriating company property, while a black employee who had been charged with the same crime was retained. As in *McDonnell Douglas*, the Supreme Court did not refer to the occupational status or job position of the comparables when it made the following ruling:

> "precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other employees involved in acts against [the employer] of comparable seriousness... were nevertheless retained...is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext."
>
> "It may be that theft of property...is a more compelling basis for discharge than obstruction of an employer's traffic arteries, but this does not diminish the illogic in retaining guilty employees of one **color** while discharging those of another **color**."

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. at 283 (emphasis added).

The First Circuit employs a reasonableness standard. See *Conward v. The Cambridge School Committee,* 171 F.3d 12 (1st Cir. 1999). "Reasonableness is the touchstone: while the plaintiff's case and the comparison cases that he advances need not be perfect replicas, they must closely resemble one another in respect to relevant facts and circumstances:

> The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the 'relevant aspects' are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared with apples."

Id. at 20 [citing *Dartmouth Review v. Dartmouth College,* 889 F.2d 13, 19 (1st Cir. 1989)]

By holding that there was no evidence that other employees were accused of the same or similar conduct, the Seventh Circuit misapplied the appropriate standard dictated by the Supreme Court in *McDonnell Douglas,* and reiterated in *McDonald v. Santa Fe Trail Transp. Co.* Moreover, the Seventh Circuit's decision conflicts with decisions of eight (8) other Circuits which have attempted to interpret and apply this standard.

IV. Whether evidence of alleged misconduct of an employee acquired after the employer has taken adverse employment action may be considered.

The evidence before the Court of Appeals, as well as the District Court, clearly established that the Respondent's ultimate decision to not reappoint Petitioner was final prior to the untimely filing of complaints of alleged sexual harassment by Virginia Hartman and Suzanne Swinehart. Therefore, any alleged misconduct on the part of Petitioner that Respondent hoped to consider after its adverse employment action is not relevant to Respondent's liability and should not have been considered.

Again, the Court of Appeals' and the District Court's decisions conflict with the decision of the Supreme Court in the case of *McKennon v. Nashville Banner Publishing Company,* 513 U.S. 352 (1995), in which the Supreme Court considered whether an employer could use after-acquired evidence to defeat a plaintiff's cause of action for employment discrimination. The Supreme Court held that such evidence may not bar the employee from recovering, but that it may render the employee ineligible for front-pay and reinstatement and limit back pay to the period between the unlawful termination and the date on which the discovery was made. *Id.* at 886. Indeed, the latter precedent established by the Supreme Court in *McKennon* has been followed by every Circuit, including the Seventh Circuit. See *O'Neal v. City of New Albany*, 293 F.3d 998, 1003 (7th Cir. 2002).

The Third Circuit, in fact, provided the following eloquent articulation regarding the issue of after-acquired evidence in the case of *Santi v. CNA Insurance Co., et al.,* 88 F.3d 192 (3rd Cir. 1996):

> What sets an after-acquired evidence case far apart is that the articulated "legitimate" reason, which was non-existent at the time of the adverse decision, could not possibly have motivated the employer to the slightest degree. After-acquired evidence, simply put, is not relevant in establishing liability under Title VII or ADEA because the sole question to be answered at that stage is whether the employer discriminated against the employee on the basis of an impermissible factor at the instant of the adverse employment action.

Id. at 205 [citing *Mardell v. Harleysville Life Ins. Co.,* 31 F.3d 1221 (3rd Cir. 1994)]

In the present case, the record is undisputed that Hartman and Swinehart, after privately meeting with Petitioner's supervisor in violation of university policy, filed their complaints alleging sexual harassment against Petitioner on May 12, 2003. In addition to the latter date being outside of the mandated time-limit for bringing such claims pursuant the Respondent's own policy, the date is also subsequent to the date upon which the Respondent's adverse employment action against Petitioner when Respondent refused to reappoint Petitioner for alleged inadequate teaching. Thus, any alleged misconduct discovered by Respondent after it took the adverse employment action is not relevant and should not have been considered by the Court of Appeals and/or the District Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

In the
United States Court of Appeals
For the Seventh Circuit

No. 05-4400

GABE KERI,

Plaintiff-Appellant,

v.

BOARD OF TRUSTEES OF PURDUE UNIVERSITY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. 04 C 224—**Theresa L. Springmann**, *Judge.*

ARGUED MAY 12, 2006—DECIDED AUGUST 14, 2006

Before MANION, KANNE, and ROVNER, *Circuit Judges.*

KANNE, *Circuit Judge.* Gabe Keri filed suit against the Board of Trustees of his former employer, Indiana University-Purdue University Fort Wayne ("IPFW"),[1] alleging race and national origin discrimination, as well as a whole host of related federal and state law claims. The district court granted summary judgment for IPFW on all claims in a 44-page opinion, and Keri appeals. For the

[1] Keri also filed suit against John Does 1 through 5. The district court granted summary judgment in favor of the Does. Keri does not appeal this determination.

reasons set forth below, we affirm and adopt the thorough opinion of the district court.

I. HISTORY

Keri is an African-American man and a native of Ghana. Keri began working for IPFW in 2000 as an assistant professor in the School of Education. He was on tenure track, and he was subject to annual reappointments by the Chancellor. The Chancellor would base his decision on the recommendations of Keri's immediate supervisor, Dr. William Utesch, along with those of the Dean of the School (Dr. Roberta Wiener) and the Vice Chancellor of Academic Affairs (Dr. Susan Hannah).

Keri's first and second evaluations went well, although students began complaining about Keri's inappropriate classroom behavior during his second year. Keri's third evaluation went well, in that he garnered recommendations for reappointment. However, student complaints continued and became more serious. Although attempts were made to counsel Keri and to improve the situation, complaints continued during the following year. In Utesch's fourth evaluation, Utesch did not recommend Keri for reappointment for the following year, citing Keri's unsatisfactory teaching performance, among other reasons. Weiner recommended appointment, although she expressed some trepidation. Hannah, faced with contradictory recommendations, investigated further, and elected not to recommend Keri for reappointment. Chancellor Michael Wartell ultimately concurred with Hannah, and Keri was not selected for reappointment.

Keri filed a claim with the Equal Employment Opportunity Commission, and his case ultimately wound up in federal court. Keri based his claims on race and national origin discrimination. *See, e.g.*, 42 U.S.C. § 2000e, *et seq*. In attempting to establish his prima facie case, Keri intro-

duced a variety of statements made by former students and colleagues indicating Keri was a good teacher. He also introduced a variety of race-disparaging comments allegedly made by Utesch. Finally, Keri argued that the students' complaints and allegations against him were baseless; in fact, he contended at least two of the complaining students were part of a conspiracy with Utesch to concoct false complaints.

II. ANALYSIS

As Judge Springmann's opinion indicates, Keri has failed to establish his prima facie case. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Herron v. DaimlerChrysler Corp.*, 388 F.3d 293, 299-302 (7th Cir. 2004). For starters, there was a lack of evidence that Keri was meeting the legitimate expectations of his employer. *See Herron*, 388 F.3d at 299 (citation omitted). There was ample evidence of widespread complaints from both students and supervisors. In fact, at least one investigation was performed by IPFW that found evidence supporting the allegations against Keri. Keri attempts to show these were simply a pretext for his lack of reappointment, but he introduces no evidence other than some race-related comments made by Utesch.[2] But even that is insufficient, as Utesch was a relatively low-level decisionmaker, and it was the Chancellor who made the ultimate decision, based on the opinions of three different individuals after further investigation.

The second hurdle Keri faced is his lack of evidence of similarly situated employees who were treated more favorably. *See id*; *Snipes v. Ill. Dep't of Corrs.*, 291 F.3d 460,

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[2] The district court merged the pretext issue with the prima facie inquiry because the arguments overlapped.

463 (7th Cir. 2002). While Keri points to 17 current and former members of the faculty as similarly situated, many of them were tenured professors. Due to their tenure, they were subject to a separate and entirely different means of oversight, making them dissimilarly situated. In other words, there was no evidence they were subject to the same standards for promotion and tenure as Keri, nor was there any evidence the tenured professors were supervised by the same individuals. As for the remaining employees, there was simply too little evidence regarding their respective situations. For example, there was no evidence whatsoever that the remaining employees were supervised by Utesch or had ever stood accused of the same or similar conduct as Keri's. Finally, Keri failed to explain when and how the non-tenured employees were treated more favorably than he.

III. CONCLUSION

In rendering her opinion, Judge Springmann thoroughly and carefully analyzed all the issues raised in this appeal. Accordingly, we AFFIRM and adopt the excellent opinion of the district court. A copy of the district court's order is attached.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

GABE KERI,	)	
Plaintiff,	)	
	)	
v.	)	Case No.: 1:04-CV-224
	)	
BOARD OF TRUSTEES OF PURDUE UNIVERSITY, *et al.*,	)	
	)	
	)	
Defendant.	)	

OPINION AND ORDER

On June 10, 2004, the Plaintiff, Dr. Gabe Keri, sued in this Court his former employer, Indiana Purdue Fort Wayne University (IPFW), and Does 1,2,3,4, and 5. The Plaintiff, a black man and a native of Ghana, claims that IPFW discriminated against him on the basis of his race and national origin when it did not reappoint him as a teacher for the 2004-2005 academic year. He also believes that the university's decision not to reappoint him was further motivated by its desire to retaliate against him for voicing concerns that he was being mistreated by his supervisor and that the

university engaged in discriminatory practices. In addition, the Plaintiff claims that the Defendant conspired to smear his reputation by falsely alleging that he sexually harassed some of his students and used ineffective teaching methodologies. Finally, the Plaintiff asserts that the Defendant is liable under the Indiana Tort Claims Act for intentional infliction of emotional distress, negligent infliction of emotional distress, negligent supervision, and common law wrongful termination.

On September 9, 2004, the Plaintiff moved the Court to amend the caption of the case to reflect that he was suing the Board of Trustees of Purdue University, not IPFW. The Court granted the motion on September 10, 2004.

On April 7, 2005, Defendant Board of Trustees of Purdue University moved for summary judgment. On May 28, the Plaintiff filed a Response, and on June 10, the Defendant filed its Reply. On that same day, the Defendant moved to strike parts of the Plaintiff's

Response. On June 22, the Plaintiff responded to the Defendant's motion to strike, and on June 28, the Defendant filed its Reply in support of the motion to strike.

On July 22, 2005, the Defendant filed a Motion to Bifurcate Damages Issues to which the Plaintiff did not respond.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT[1]

A. Summary Judgment Standard

The Federal Rules of Civil Procedure mandate that motions for summary judgment be granted "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "In other words, the record must reveal that no reasonable jury

[1] As will be explained below, Does 1, 2, 3, 4, and 5 are no longer proper parties in this suit. *See infra* at 24. Accordingly, only one Defendant, the Board of Trustees of Purdue University, remains in this case, to which the Court will refer as the "Defendant."

could find for the nonmoving party." *Dempsey v. Atchison, Topeka, & Santa Fe Ry. Co.*, 16 F.3d 832, 836 (7th Cir. 1994)(citations and quotation marks omitted). Rule 56(c) further requires the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A party seeking summary judgment bears the initial responsibility of informing a court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party may discharge its "initial responsibility" by simply "'showing'—that is, pointing out to the district court—that there is an absence of evidence to

support the non-moving party's case." *Id.* at 325. When the non-moving party would have the burden of proof at trial, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* at 323, 325; *Green v. Whiteco Indus., Inc.,* 17 F.3d 199, 201 n.3 (7th Cir. 1994); *Fitzpatrick v. Catholic Bishop of Chicago,* 916 F.2d 1254, 1256 (7th Cir. 1990). However, the moving party may, if it chooses, support its motion for summary judgment with affidavits or other materials and thereby shift to the non-moving party the burden of showing that an issue of material fact exists. *Kaszuk v. Bakery & Confectionary Union & Indus. Int'l Pension Fund,* 791 F.2d 548, 558 (7th Cir. 1986); *Bowers v. DeVito,* 686 F.2d 616, 617 (7th Cir. 1982); *Faulkner v. Baldwin Piano & Organ Co.,* 561 F.2d 677, 683 (7th Cir. 1977).

Once a properly supported motion for summary judgment is made, the non-moving party cannot resist the motion and withstand summary judgment by merely

resting on its pleadings. Fed.R.Civ.P. 56(e); *Donovan v. City of Milwaukee,* 17 F.3d 944, 947 (7th Cir. 1994). Federal Rule of Civil Procedure 56(e) establishes that "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts to establish that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see also Anderson v. Liberty Lobby,* 477 U.S. 242, 248-50 (1986). Thus, to demonstrate a genuine issue of fact, the non-moving party must do more than raise some metaphysical doubt as to the material facts; the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986); *Juarez v. Ameritech Mobile Communications, Inc.,* 957 F.2d 317, 322 (7th Cir. 1992). Conclusory allegations and self-serving affidavits, if not supported by the record, will not preclude summary judgment. *Haywood v. N. Am. Van Lines, Inc.,* 121 F.3d 1066, 1071 (7th Cir. 1997).

In viewing the facts presented on a motion for summary judgment, a court must construe all facts in a light most favorable to the non-moving party and draw all legitimate inferences and resolve all doubts in favor of that party. *NFLC, Inc. v. Devcom Mid-Am., Inc.*, 45 F.3d 231, 234 (7th Cir. 1995); *Doe v. R.R. Donnelley & Sons Co.*, 42 F.2d 439, 443 (7th Cir. 1994); *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1440 (7th Cir. 1992). A court's role is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Anderson*, 477 U.S. at 249-50; *Doe*, 42 F.3d at 443.

B. Defendant's Motion to Strike

The Defendant moves to strike portions of the Plaintiff's Response, claiming that it contains statements that are hearsay, irrelevant, or beyond the knowledge of the witnesses. The Defendant challenges the following statements:

1. Dr. Campbell-Watley complained bitterly about student evaluations that most students have not had black faculty and they can be brutal. (Pl.'s Facts; Libii Dep. 41).

2. Campbell-Watley was promoted but she did not like it here long enough to stay. (Pl.'s Facts 6; Libii Dep. 43).

3. Campbell-Watley was happy to move to the University of North Carolina-Charlotte, because as "she put it, 'there were other people like me there and I feel more comfortable.'" (Pl.'s Facts 6; Hickey Dep. 13-14).

4. Campbell-Watley is the second native-born African-American that has ben tenured at IPFW in forty (40) years. (Pl.'s Facts 7; Libii Dep. 43).

5. Libii's recollection is that "Dr. Utesch was berating black folks in meetings. I remember Dr. Keri mentioning this many, many times." (Pl.'s Facts 15, 16; Libii Dep. 46).

6. Despite his experiences, Libii had never filed a complaint at a university. (Pl.'s Facts 17; Libii Dep. 48).

7. Keri was about to be dismissed on bogus charges. (Pl.'s Facts 17; Libii Dep. 48-49).

8. Carter left because she was unhappy with the climate. (Pl.'s Facts 20; Hickey Dep. 12).

9. Hickey testified that in her opinion, IPFW has a long way to go in being able to retain minority faculty. (Pl.'s Facts 20; Hickey Dep. 42).

10. She further testified that the climate for diversity is not good. (Pl.'s Facts 20; Hickey Dep. 42).

11. Libii has had the painful experience of seeing African-American or people of African descent come and go with pain. (Pl.'s Facts 20; Libii Dep. 36-37).

12. They come with families, some of them break down and their marriages fall apart. (Pl.'s Facts 20-21; Libii Dep. 37).

13. They come with hope and leave with despair. (Pl.'s Facts 21; Libii Dep. 37).

14. A couple of SOE-Gregory and Beverly Bell-came and left disenchanted really angry with the University. (Pl.'s Facts 21; Libii Dep. 37).

15. Dr. Sam White, in the School of Engineering, came and left disenchanted. (Pl.'s Facts 21; Libii Dep. 37).

16. Dr. Solomon Waco came from Ethiopia in the Department of Sociology. He was raving about how he was treated. (Pl.'s Facts 21; Libii Dep. 37-38).

17. Dr. Geneva Herd in SPEA came and left. (Pl.'s Facts 21; Libii Dep. 38).

(Def.'s Mem. Supp. Mot. Strike 2-3.)

The Plaintiff argues that all challenged statements are proper for the Court's consideration.

(1) Statements 6 and 11

The Defendant argues that statements 6 and 11 are irrelevant to the Plaintiff's claims because they belong to Dr. Josue Njock Libii who is associated with the Defendant's School of Engineering, Technology, and Computer Science, not the School of Education. The Plaintiff insists that the statements are relevant

because both Dr. Libii and the Plaintiff are of African descent, taught at IPFW, were subject to the same tenure and promotion standards, were subordinate to Dr. Susan Hannah, the Vice Chancellor of Academic Affairs of IPFW, and Michael Wartell, the Chancellor of IPFW, and had doctoral degrees. The Plaintiff submits that Libii's testimony that his own opportunities at IPFW were stifled creates a mosaic of evidence that the Defendant intentionally discriminated against the Plaintiff. In support of this position, the Plaintiff relies on *Jordan v. City of Gary*, 396 F.3d 825, 832 (7th Cir. 2005).

The Plaintiff's reliance on *Jordan* is misplaced. The portion of *Jordan* cited by the Plaintiff explains a plaintiff's burden under the direct evidence method to show employment discrimination. *See id.* It tells nothing about what constitutes relevant evidence within the *McDonnell Douglas* framework, under which the Plaintiff challenges the Defendant's Motion for Summary Judgment. Instead, the Plaintiff should have

considered Federal Rule of Evidence 401, which defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

In light of this Rule, the similarities between Dr. Libii and the Plaintiff are too remote for Statements 6 and 11 to have any relevance to the Plaintiff's claims. The two men worked at different schools of IPFW and had different immediate supervisors. In addition, Dr. Libii was tenured ten years before the Plaintiff was hired by IPFW. Most of the Plaintiff's dealings were with Dr. Utesch whom Dr. Libii never even met. Moreover, any probative value of Libii's statements is substantially outweighed by the danger of unfair prejudice, which is another reason for excluding these statements from the record. *See* Fed. R. Evid. 403. Therefore, the Court will strike Statements 6 and 11 from the Plaintiff's Response.

(2) Statements 1-4, 8, and 11-17

Statements 1-4, 8, and 12-17, asserted either by Dr. Libii or Dr. Gail Hickey, describe other professor's experiences at IPFW. For example, statements 1-4 speak of Dr. Campbell-Watley, one of the two African-Americans tenured at IPFW, who complained bitterly that most students were not taught by black faculty. Dr. Campbell-Watley "did not like it here long enough to stay" and was happy to move to the University of North Carolina-Charlotte. Statement 8 tells of Carter, who was unhappy with the school's climate. Statements 12 and 13 describe the faculty members who came to IPFW with families with hope but had to leave in despair. Some of their families broke down and marriages fell apart. Statements 14-17 depict disenchanted and angry faculty members, who left the university because of the way they were treated, presumably, by the university.

The Defendant argues that these statements are inadmissible and should not be considered by the Court

on summary judgment. The Plaintiff responds that the statements are admissible under Federal Rules of Evidence 701 and 801(d)(2)(D) because they either express opinions of the statement giver or are offered against the Defendant as statements by the Defendant's agents or servants concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

To fall within Rule 801(d)(2)(D) a statement must be about a matter "within the subject matter of the agency." *Young v. James Green Mgt., Inc.*, 327 F.3d 616, 622 (7th Cir. 2003). Furthermore, "in the context of employment discrimination cases, 'the declarant must be involved in the decisionmaking process affecting the employment action involved.'" *Id.* n.2 (citing *Aliotta v. Nat'l R.R. Passenger Corp.*, 315 F.3d 756, 762 (7th Cir. 2003).

Libii's and Hickey's statements fail to satisfy either requirement. First, they do not concern the matter of their agencies as IPFW professors: they do

not relate to teaching or some other functions of their job. Rather, Dr. Libii and Dr. Hickey are describing their colleagues' alleged frustrations while working at IPFW. Second, neither Dr. Libii nor Dr. Hickey had any decisionmaking authority regarding other faculty members' employment.

What is more, Libii's and Hickey's assertions are not proper Rule 701 opinion statements, which "most often take[] the form of a summary of first-hand sensory observations." *United States v. Conn,* 297 F.3d 548, 554 (7th Cir. 2002).

> The prototypical example of the type of evidence contemplated by the adoption of Rule 701 relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences....Other examples of this type of quintessential Rule 701 testimony include identification of an individual, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, the value of one's property.

Id. n.2 (citing *Asplundh Mfg. Div. Benton Harbor Eng'g*, 57 F.3d 1190, 1196-98 (3d Cir. 1995)). Dr. Libii and Dr. Hickey are offering not their sensory but mental observations, dispersed with hearsay, and not relevant to the Plaintiff's claim that the Defendant discriminated against him on the basis of his race and national origin. Finally, the described problems of other faculty members are too vague to be blamed on either the persons directly involved in this lawsuit or the Defendant in general.

(3) Statements 5 and 7

The Defendant wants the Court to strike Libii's Statement 5 that "Dr. Utesch was berating black folks at meetings," because Dr. Libii himself had no personal knowledge of that. The Plaintiff argues that the statement should not be stricken even as hearsay because it has circumstantial guarantee of trustworthiness required by the Federal Rule of Evidence 807 (residual exception to the hearsay rule).

The Seventh Circuit has directed the courts to narrowly construe the residual exception to the hearsay rule. *See Akrabawi v. Carnes Co.*, 152 F.3d 688, 697 (7th Cir. 1998) ("We begin by noting this circuit's emphasis on narrowly construing the residual provision to prevent it from becoming the exception that swallows the hearsay rule."). Five elements must be satisfied before hearsay is admitted in evidence: "(1) circumstantial guarantees of trustworthiness; (2) materiality; (3) probative value; (4) the interests of justice; and (5) notice." *United States v. Hall*, 165 F.3d 1095, 1110 (7th Cir. 1999). "Critical to the admission of a hearsay statement under 803(24) [now 807] is a finding by the district court that the statement is trustworthy."

The Court does not believe that all these elements have been satisfied. Libii's statement that Utesch berated black folk is entirely based on what the Plaintiff told him. Dr. Libii himself has never met Utesch and has never attended a faculty meeting at the

School of Education. Although Dr. Libii is a disinterested party, the source of his knowledge is the Plaintiff himself. There is no evidence that Dr. Libii learned of Dr. Utesch's conduct during the faculty meetings from any other person. As such, the statement lacks guarantees of trustworthiness so as to be admitted in evidence. Accordingly, the Court will not consider Statement 5.

Likewise, Statement 7, that "[the Plaintiff] was about to be dismissed on bogus charges," is not based on Libii's personal knowledge. The Plaintiff has not presented any material facts that would show how he knew that the charges were bogus. Accordingly, the Court will not consider Statement 7 in its ruling on the Defendant's motion for summary judgment.

(4) Statements 9 and 10

Statements 9 and 10 were taken out of the context of Hickey's overall testimony. They appear to indicate that Dr. Hickey believed that IPFW's climate for diversity was not good and, as a result, the

university had a long way to go to retain minority faculty members. However, when Hickey's entire testimony is considered, it is obvious that she is troubled not so much with IPFW's policies as with the local community's perception of minorities. She listed other reasons too as to why she thought minority faculty members did not remain at IPFW:

> It could be a variety of reasons having to do with the pay scale, which is, you probably know, at the bottom of the state barrel and not growing. It could be that the raises that we get for the most part aren't reflective of the amount of work we do. It could be the climate of Fort Wayne/Allen County is still unfortunately, in my mind at least, not very open to diversity. In fact when I came here in 1988 and 1989, to my colleagues in Tennessee and Georgia and Alabama who-everybody thinks the deep south is prejudiced, is backward when it comes to racial relations. And my colleagues there absolutely, positively did not believe my phone calls, my written communications saying we were still dealing with desegregation here in the schools, in Allen County/Fort Wayne Schools. They absolutely did not believe me. I had to cut articles out of the paper and send them to them before they would believe it. So maybe it has to do something with the climate for diversity in this area. Which I hope is changing.

(Hickey Dep. At 42-44)

The Court will not strike Statements 7 and 10, which are her opinions, but will consider them in the context in which they were pronounced.

C. Material Facts

Resolving all genuine disputes and drawing all reasonable inferences in the Plaintiff's favor, the facts assumed to be true for the purposes of ruling on the Defendant's Motion for Summary Judgment are as follows:

(1) IPFW's Structure

Indiana University Purdue University at Fort Wayne (IPFW) is jointly owned by Indiana University (IU) and Purdue University, and managed by Purdue pursuant to an agreement between the universities. According to this agreement, Purdue is the responsible corporation with full power, authority, and responsibility to manage and operate IPFW for the benefit of Purdue and IU. Purdue is responsible for the business operations of IPFW, including fiscal management and control. IPFW's chancellor is

appointed and employed by Purdue, with the approval of IU, and reports to the Purdue president. Purdue appoints and employs all other administrative officers, faculty, and staff members. Purdue establishes, charges, and collects all tuition and fees related to IPFW. The Board of Trustees of Purdue University is a corporate body created by the Indiana legislature.

IPFW's School of Education consists of two departments: Department of Professional Studies, guided by Dr. William Utesch, and the Department of Educational Studies, guided by Dr. Kathleen Murphy. The School of Education is headed by Dean Roberta Wiener, who reports to Dr. Susan Hannah, the Vice Chancellor of Academic Affairs of IPFW. Dr. Hannah, in turn, is accountable to Michael Wartell, the Chancellor of IPFW.

(2) Plaintiff's Hire

The Plaintiff is a black man and a native of Ghana. He lived there until the age of nineteen. In 2000, the Plaintiff was attending a meeting of the

Indiana Counselor Educators and Supervisors, where he met Dr. James Burg of IPFW's School of Education. During a conversation, Dr. Burg advised the Plaintiff that the School of Education was looking to hire a counseling coordinator.

The Plaintiff applied for the position, but while he was away in Africa, Dr. Utesch left a telephone message for him, indicating that he was not being considered for the position. After returning from Africa, the Plaintiff went to IPFW to speak with Dr. Utesch. However, Dr. Utesch was not available, and the Plaintiff spoke with Dr. Burg, who told him that the search committee was considering a list of other applicants.

The search committee, however, failed to find an appropriate person for the position. As a result, Dr. Utesch suggested to the committee that it reconsider the Plaintiff because he had heard good things about him and found him to be articulate and passionate about school counseling. The committee agreed with Dr.

Utesch, who then called the Plaintiff to advise him that he was once again being considered for the position. The Plaintiff had a series of interviews, which resulted in his appointment as a tenure track Assistant Professor of Education for the 2000-2001 academic year. The Plaintiff's hire was initially requested by Dean Wiener, and after a positive recommendation from Dr. Hannah, the request was approved by Chancellor Wartell. Dr. Utesch strongly supported the hiring decision.

During the time the Plaintiff was employed at IPFW, the School of Education had about twenty faculty members. One other person, beside the Plaintiff—Dr. Gloria Campbell-Watley—was of African descent.

(3) Plaintiff's Performance

As a faculty member on tenure track, the Plaintiff was subject to once-a-year evaluation by the university. The evaluations focused on three areas: teaching, research, and service. Satisfactory performance in all three areas assured a tenure

candidate's reappointment for the following academic year.

The Plaintiff would first be evaluated by his immediate supervisor, Dr. Utesch. After Dr. Utesch's evaluation, he would be independently reviewed by the Dean of the School of Education, Dr. Wiener. Dean Wiener then would make her own recommendation regarding the reappointment, and both Dr. Utesch's and Dean Wiener's recommendations would be forwarded to Dr. Hannah, the Vice Chancellor of Academic Affairs. Dr. Hannah then would make her recommendation regarding the reappointment, and would forward it and Dr. Utesch's and Dr. Wiener's recommendations, along with the materials submitted by the Plaintiff, to Chancellor Wartell, who would make the final decision about reappointment. This process would have continued until August 2007, when the Plaintiff would have become eligible for tenure.

(a) *Plaintiff's First Evaluation*

The Plaintiff was first evaluated on January 5, 2001, about six months after he began working at IPFW. Dr. Utesch found that the Plaintiff was a competent instructor and a prolific writer, and was impressed with the Plaintiff's research. Among other things, Dr. Utesch noted:

> Solicited and unsolicited comments attested to [the Plaintiff's] competence and passion as an instructor. I recommend that the [the Plaintiff] continue to make adjustments as he orients himself to the program. I am impressed with his dedication to course preparation and his genuine support and encouragement of students. I suggest that [the Plaintiff] provide a variety of evidence to document effectiveness as an instructor.

(Pl.'s Ex. 8 at PU-0346.) Dr. Utesch recommended the Plaintiff's reappointment for the 2001-2002 academic year.

Dean Wiener also evaluated the Plaintiff's performance in January 2001 and found him to be a fine and dedicated teacher. She commented favorably on his research and services, and, on January 11, 2001, recommended his reappointment. Six days later, Dr.

Hannah recommended reappointment to Chancellor Warttell, who agreed with her decision.

(b) *Plaintiff's Second Evaluation and Academic Year 2001-2002 Performance*

The Plaintiff was next evaluated eight months later, in September 2001. Again, both Dr. Utesch and Dean Wiener found that he was making satisfactory progress in each of the three evaluative areas, and each recommended reappointment. Both Dr. Hannah and Chancellor Wartell approved the recommendations and, in May 2002, the Plaintiff was reappointed for the 2002-2003 academic year.

Before the evaluations were completed, several faculty members observed the Plaintiff in the classroom and were impressed with his teaching. For example, after observing the Plaintiff teach, Dr. Hickey wrote him: "please allow me to thank you for the opportunity to observe an inspiring and effective teacher at work!" (Pl.'s Ex.11.) Another faculty member, Associate Professor of Education David R. Skeleton expressed his

satisfaction with the Plaintiff's teaching in these words: "conduct of the class session displayed excellent preparation on the part of the instructor. [The Plaintiff] is be commended for instructional techniques utilized in his preparation." (Pl.'s Ex. 12.) Another teacher, Professor Jerry Garret, who also observed the Plaintiff in the classroom wrote:

> My professional opinion is that I observed one of the most outstanding lessons I have ever observed in my 22 years in education. Not enough teachers are commended for the outstanding job that they do. For me, you are definitely a professor to be commended for the excellent job teaching that I observed in your class today.

(Pl.'s Ex. 15.)

But despite this admiration from the observers of his classes, the Plaintiff also received complaints about his conduct. Beginning in November 2001, Dr. Utesch began getting student complaints about the Plaintiff's inappropriate classroom behavior. Dr. Utesch informed the Plaintiff about the student's complaints and encouraged him to address them with

the students directly. Dr. Utesch believed that the situation would improve with time.

(c) *Plaintiff's Third Evaluation and Academic Year 2002-2003 Performance*

The Plaintiff was again evaluated for reappointment at the beginning of March 2002. Dr. Utesch noted that the Plaintiff has responded to student concerns and has sought three outside observers for his classroom teaching. Recognizing that the Plaintiff continued to respond to student feedback and sought to improve his teaching, on March 25, Dr. Tuesch recommended the Plaintiff for reappointment. In his recommendation, Dr. Utesch stated that he was "impressed with his dedication to student learning and responsiveness to student and peer feedback." (Pl.'s Ex. 17.)

Dean Wiener also recommended reappointment on March 22, noting that the Plaintiff received "high student evaluations except for one class this past year." Both Dr. Hannah and Chancellor Wartell agreed with

the recommendations, and on April 10, 2002, the Plaintiff was reappointed for the 2003-2004 academic year.

However, student complaints against the Plaintiff continued during the 2002-2003 academic year. In March 2003, S.S.,[2] a graduate student employee at IPFW, approached Dr. Utesch and reported that the Plaintiff had made inappropriate comments to her during her interview for a clinic manager's position. She reported that, in the summer of 2001, the Plaintiff had told her that she should wear tighter pants and that she did not have big enough "boobs" because she was white. Also in March 2003, a second graduate student employee, V.H., reported to Dr. Utesch that during his classes the Plaintiff bashed homosexuals and Catholics. Dr. Utesch believed V.H. because her complaints were consistent with those from other students in other classes taught by the Plaintiff.

[2] The parties agreed to use initials to protect the privacy of student complaints.

Dr. Utesch asked S.S. and V.H. to discuss their allegations with Dean Wiener.

(d) *Plaintiff's Final Evaluation and Non-reappointment*

From November 2001 through March 2003, Dr. Utesch received six student complaints about the Plaintiff. Two of them were anonymous. All of them accused the Plaintiff of inappropriate behavior. On the basis of these complaints, and especially on the basis of S.S.'s and V.H.'s complaints, Dr. Utesch decided not to recommend the Plaintiff for reappointment for the 2004-2005 academic year. On March 31, 2003, he wrote concerning the Plaintiff's conduct:

> On-going student complaints have become more serious over the past year. I have had several meetings with [the Plaintiff] to attempt to resolve concerns about his teaching effectiveness and his professionalism. There appear to be no changes. Students continue to be subjected to discussion to inappropriate topics irrelevant to the content of the course within the classroom. He has criticized other faculty and students in public settings. His lectures are often unorganized and ineffective. He has consistently failed to fulfill his responsibilities for supervising students in the clinic setting. The School of Education's protocol for the formal evaluation of faculty by

> students has been violated because [the Plaintiff] did not leave the room while students were completing evaluations. Female students report inappropriate comments about their appearance. The trust and respect of students has been diminished by misuse of power. I conclude that his teaching performance is unsatisfactory.

(Hannah Dep. At Ex. 15)

Dr. Utesch also noted that the Plaintiff remained productive in research and service.[3] Nevertheless, he concluded that, "because satisfactory teaching performance is essential for progress toward promotion and tenure and based upon all sources of evidence made available to me regarding [the Plaintiff's] performance, I cannot recommend his reappointment." *Id.*

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[3] Dr. Utesch also received a report from the School of Education's Peer Review Committee that commended the Plaintiff "for his willingness to blend the Research in Counseling course with the Research in Elementary Education course," "for his high level of research productivity," and "for his high level of involvement in professional organizations." (Pl.'s Ex. 18). Peer Review Committee's reports, such as this one, had no force of recommendations but, if presented, they were considered by the department's chair and the dean during the overall evaluation of a teacher. (*See* Utesch Dep. At 81-82.)

Dean Wiener thought otherwise about the Plaintiff's prospects for the future. About a month before Dr. Utesch's negative recommendation, in February 2003, Dean Wiener recommended the Plaintiff for reappointment, although with some hesitation:

> ...In the area of teaching there are issues which his chair has discussed with him on various occasions. The problems have been shared with me by both [the Plaintiff] and Dr. Utesch (who is both Chair of Professional Studies and Program Director of Counselor Education) and although I have tried to counsel and make suggestions to both, at this time there seems to be an impasse.
>
> ...
>
> I understand from both Dr. Utesch and [the Plaintiff] that there have been several complaints from students in the Counseling program with regard to [the Plaintiff's] teaching style. Dr. Utesch has kept records of his talks with [the Plaintiff], along with the behaviors he suggests need to be changed. [The Plaintiff] has indicated his willingness to change to meet students needs and asks, "What could I (can I) do differently?" Both he and his Chair appear frustrated-but Dr. Utesch has delineated what the issues are and what he anticipates will be corrected in terms of faculty/student interactions during this spring and summer. I think this will be difficult to resolve although both [the Plaintiff] and Dr. Utesch are very eager for a congenial solution. Human Resources and

> Affirmative Action officers have been notified of this problem.
> In spite of the above, I recommend [the Plaintiff's] reappointment. This is due to his record of productive research and publications and his eagerness and verbal commitments to work on changing teaching style to better meet the needs of the program and the students.

(*Id.*)

Because the Dean and the Department Chair disagreed about the Plaintiff's future with the university, Dr. Hannah made the ultimate decision regarding his reappointment. She met with both Dean Wiener and Dr. Utesch to discuss their recommendations and reviewed all available documents. Dr. Hannah also made sure that Dr. Utesch consulted with Judy Dilorio, IPFW's Affirmative Action Officer, and James Ferguson, IPFW's Human Resources Services Director, to insure that all procedures were followed. On April 3, Dr. Hannah recommended to not reappoint the Plaintiff:

> I do not support reappointment of [the Plaintiff] because of unsatisfactory performance in teaching. The recommendation for non-reappointment from the chair and the equivocal

> nature of the dean's review raise very serious questions about his teaching competence. His two previous reviews identified some concerns but were hopeful of improvement. Student complaints of ineffective teaching and a lack of professionalism, however, have increased over this past year despite verbal and written warnings and efforts at assistance. His research and productivity do not compensate for unsatisfactory teaching. I therefore recommend that his appointment at IPFW terminate at the end of 2003-04.

(*Id.*) Chancellor Wartell concurred with her recommendation and, that same day, the Plaintiff was informed of the university's decision.

On May 15, in response to the Plaintiff's request, Dr. Hannah wrote a letter further detailing the reasons for his non-reappointment. Among other things, she summarized the Plaintiff's faults:

> ...
> My recommendation is based on an evaluation ineffective teaching by the Acting Chair, Dr. Bill Utesch and serious questions raised by Dean Roberta Wiener...Students complain that you berate students publicly, complimenting some and criticizing others to the point of humiliation in class...Students also reported that you have revealed personal biases about sexual orientation that limit your ability to deal with these issues in the counseling setting...

Unprofessional behavior. Students report that you break confidentiality by sharing personal information about some students with others. Students also find the way you handle sexual information and topics in the classroom offensive. One student reported that you made sexually inappropriate comments about her appearance and about what is necessary to be successful. You have made female students uncomfortable by insisting that they close your office door over their objections. In some classes students report that you told them you could identify handwriting and therefore they felt constrained in making negative comments on course evaluations. One student reported that you have confronted students who have complained in manner that was considered retaliatory. These behaviors have produced a "chilling effect" that appears to have made learning difficult to the point of at least one student stating that she plans to leave the program. I am especially concerned about the complaints of students who report that you have not been either present or attentive during the times you were responsible for supervising students in a clinic situation.

Inconsistent Reports. At the same time that some students have brought very serious claims of ineffectiveness and unprofessional behavior, others have provided glowing testimonies about your work. They report that you have gone out of your way to help them find jobs and prepare or interviews. They find you very professional both in and out of the classroom. They report that they find your classes challenging and excellent preparation for practice. They criticize students who complain as not being willing to perform up to your standards. A number of those who defend you argue that you

> present a clash of expectations to IPFW students to which some have reacted negatively. Faculty peers who have reviewed your classes also have differing views of your effectiveness in the classroom. Interpreting these inconsistencies is difficult, but the number of student complaints over such a long period convinces me that this is not the case of one or two disgruntled students who can be dismissed as unfair or of one course that did not go well. It is reassuring to know that some students and peers find your work positive, but in so doing highlights the point that other do not.
>
> ...In successful cases, the faculty member takes the constructive criticism to heart and works hard to change behavior in order to become more effective. To me and to others you seem initially to be willing to respond to the concerns but then become defensive and attempt to argue them away rather than taking responsibility for making improvements. I see no consistent effort to make sure that despite the advice given to you by your peers, your chair, and your dean, your behavior has actually changed in such a way that students would perceive a more professional learning environment.

(Hannah Dep., Ex. 15.)

(e) *IPFW's Investigation of Formal Complaints Against the Plaintiff*

On May 12, 2003, S.S. and V.H. each filed a formal complaint against the Plaintiff, claiming that he harassed and discriminated against them in both the

classroom and in their work as graduate assistants. Elaine Blakemore was assigned by Chancellor Wartell to investigate the complaints in accordance with IPFW's procedures. She interviewed the complainants and the Plaintiff, as well as Dr. Utesch and two other faculty members in the Department of Education Studies. She also interviewed thirteen current and former students from the Counselor Education program representing four different academic cohorts.

Blakemore issued a detailed report with extensive findings on both students' complaints. In the report she acknowledged that, because of the gravity of allegations, the investigation was difficult for her personally. She noted that, during the investigation, the Plaintiff was cordial and professional, and that he was bewildered by the charges. (Pl's Ex. 25 at 1.) She also stated that she found both complainants credible and genuinely anguished about their experiences. (*Id.*) Blakemore commended S.S. and V.H. for their courage to come forward with their complaints:

> Finally, I would like to express my utmost respect toward [S.S. and V.H.] for their courage coming forward with their complaints. I spoke to several other students who believed that they had been harmed by [the Plaintiff], but were afraid to speak, lest their future careers be harmed. I spoke to former students who said that they had wanted to report their concerns about his behavior once they left the university, but they never had, and that they felt distressed and guilty that they had not. Hence the university should applaud those who are willing to come forward with a serious complaint at possible risk to themselves, particularly when they are taking the risk partly for the good of others.

(*Id.* at 2-3.)

Blakemore interviewed numerous students and asked them general questions about the School of Education and the Plaintiff. Blakemore noted that some of the students were very supportive of the Plaintiff and had no complaints at all; others corroborated the complainants:

> Some expressed shock and dismay about how disrespectfully they thought that other students treated him in the classroom. On balance, though, the majority of students to whom I spoke provided examples of experiences that were consistent with [V.H.'s]' and [S.S.'s] complaints. Since I did not speak to every student who had ever taken a class from [the

> Plaintiff], I cannot possibly know what percentage of students over the few years…found his behavior inappropriate. I can say, however, that many of the students and former students to whom I spoke found several aspects of his behavior inappropriate, and that their accounts were startlingly consistent.

(*Id.* at 2.)

Blakemore concluded her report by finding that the Plaintiff violated the university's policies as to the one complainant, but not as to the other:

> Using the standard of the "preponderance of the evidence" required by the Purdue University procedures, I find that [the Plaintiff] has violated the Purdue University antiharassment policy outlined in Executive Memorandum C-33. With respect to the specific complaints, I find that ms. [V.H.] has experienced a hostile educational environment, and that she is the victim of harassment. In her complaint she indicated that she had been the victim of discrimination, but I do not find that to be the case. Other students were similarly treated, and I do not know on what grounds she could have experienced discrimination.
> Largely because her complaints were not reported in the appropriate time frame, I cannot find that Ms. [S.S.] has also been specifically harassed under the Purdue policy. However, like other students in the Counselor of Education Program, she has certainly been subjected to hostile educational environment.

(*Id.* at 9-10.)

In light of her findings, Blakemore recommended that the Plaintiff "be immediately removed from his teaching and practicum supervision responsibilities, and from supervisor contact with students in the School of Education at PFW." (*Id.* at 10.) However, she believed that the university should honor his 2003-2004 academic year contract, and that he should be allowed to continue his research so long as he has was veiled from interaction with students. (*Id.*)

Blakemore presented her report to the University' Committee on Equity, which concurred with Blakemore's conclusions. On August 4, 2003, Chancellor Wartell notified the Plaintiff that, for the 2003-2004 academic year, he would be assigned to a position entirely dedicated to research, but that he would not be permitted to use his university office.

On August 2, 2003, the Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission, claiming that the Defendant

discriminated against him on the basis of race and national origin.

(f) *The Plaintiff's Complaints*

From 2001 until 2003, Dr. Utesch held only two faculty meetings in which the Plaintiff was present. (Pl.'s Dep. 167-68.) At those meetings, in which Dr. Burg was also present, Dr. Utesch talked negatively about certain minority students. (*Id.* at 162.) At one meeting, he suggested that a student who wrote very poorly should not be in the School of Education just because she was black. Another time, Dr. Utesch told the Plaintiff that he was an American Indian but that he did not go around "tooting [his] horn to get special treatment." (*Id.* at 165.) This particular conversation came about as Dr. Utesch was discussing some minority students who thought they deserved to be in the School of Education but show performance was inferior. (*See id.* at 164-65.) In addition, Dr. Utesch once told the Plaintiff that the Plaintiff was a naturalized United States citizen, not an African-

American. (Dilorio Dep. 17.) The Plaintiff complained to Dean Wiener regarding these comments from Dr. Utesch. He also sent an email to Dilorio restating those complaints and describing another time when "Utesch asserted that minority students, particularly females, are uncomfortable to deal with because they are quick to invoke the notion of a lawsuit." (*Id.* at 15-17.) Dilorio met with Dr. Utesch to discuss to Plaintiff's complaints but she believed that the matters asserted in the email did not assert actionable allegations.

The Plaintiff identified seventeen current and former IPFW employees that he claims were similarly situated and treated more favorably than he: Gloria Campbell-Watley (Pl.'s Dep. 183), Phyllis Agnes (*Id.* at 186), Jim Burg (*Id.*), William Utesch (*Id.* at 187), Mark Myers (*Id.*), Janice Schraeder (*Id.* at 188), Sheena Choi (*Id.*), Jerry Garrett (*Id.* at 282), John Cochren (*Id.*), Nancy Cauthron (*Id.* at 283), Joel Nichols (*Id.* at 284), Beverly Park (*Id.* at 284-85), Patricia Sellers (*Id.*

at 286), Terri Swim (*Id.* at 287), Kathleen Murphey (*Id.* at 288), Jeffrey Nowak (*Id.* at 289), and Gail Hickey (*Id.* at 305). The Plaintiff admits that Utesch, Cochren, Cothern, Nichols, Murphey, and Hickey were already tenured when he began working at IPFW. The Plaintiff is not aware if charges from students, similar to his own, were leveled against any of the above listed persons.

Around December 2, 1999, and May 22 1997, some students complained against professors G.H. and S.C. for poor teaching. These professors are still faculty members at IPFW's School of Education.[4]

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[4] Also, in his Statement of Genuine Issues and Material Facts, the Plaintiff states that "when Utesch came up for promotion, the Campus Committee voted 6-0 against the tenure of Tesch. In spite the negative votes, Utesch was granted tenure." *Id.* at 21. The Plaintiff cites page 43 of Utesch's deposition in support of this assertion. The Court has reviewed this page but is unable to determine whether the committee was recommending against Dr. Utesch's tenure or whether it was giving a general negative opinion on Dr. Utesch in its capacity as the peer review committee.

Moreover, the Plaintiff asserts that Professor S.C. was accused of plagiarism and refers the Court to Confidential Exhibit 16. This exhibit contains a letter from an English professor at IPFW, who reviewed a draft of S.C.'s research article. In the letter, the English professor is expressing her frustration about S.C.'s continual failure to attribute the sources upon which she based her article. This letter is not a formal accusation of

With his response to the Defendant's motion for summary judgment, the Plaintiff submitted affidavits from ten former students praising him as a dedicated and qualified teacher and a person of integrity.

D. Does 1, 2, 3, 4, and 5

Along with the Board of Turstees of Purdue University, the Plaintiff sued Does 1, 2, 3, 4, and 5 for violation of 42 U.S.C. §§ 1981, 1985(3), and 1986. In its motion for summary judgment, the Defendant challenges the Plaintiff's claims against these Does as no longer proper at this stage of the litigation. The Defendant relies on *Doe v. Blue Cross & Blue Shield of Wisconsin,* 112 F.3d 869, 872 (7th Cir. 1997), which noted that "[t]he use of fictitious names is disfavored, and the judge has an independent duty to determine whether exceptional circumstances justify such a departure from the normal method of proceeding in

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plagiarism. Moreover, it is unknown whether S.C. ever submitted the article for publications and whether she corrected the attribution problems. Without this information, and especially without any evidence that the university's administration knew that S.C. published a plagiarized article, the Court finds the Plaintiff's characterizations of S.C. as a "plagiarist" overbroad.

federal courts." Further, the Defendant argues that now it would be too late to substitute Does 1 through 5 because any claims against other parties are barred by the two-year statute of limitations.

The Plaintiff has not responded to the Defendant's contentions and seems to have conceded that he cannot proceed against Does 1 through 5. Accordingly, the Plaintiff's claims against Does 1, 2, 3, 4, and 5 are denied as a matter of law.

E. Plaintiff's 42 U.S.C. §§ 1981, 1985(3), and 1986 Claims

(1) ***Defendant's Immunity***

The Defendant argues that the Plaintiff's 42 U.S.C. §§ 1981, 1985(3), and 1986 claims are barred because, as an arm of the state, it is entitled to sovereign immunity under the Eleventh Amendment. The Plaintiff responds that the Defendant is not a State agency and thus is not immune from suit under §§ 1981, 1985(3), and 1986. He submits that finding of immunity is a fact sensitive inquiry and that the

Defendant has not established IPFW's general legal status. Finally, the Plaintiff suggests that the Defendant is not protected by immunity because, among other things, it was sued for injunctive relief.

"The jurisdictional bar of the Eleventh Amendment protects the state and its agencies; it does not shield political subdivision." *Kashani v. Purdue Univ.*, 813 F.2d 843, 845 (7th Cir. 1987). Whether a state university is like a state agency or like a political subdivision depends on the specific facts of the case. The courts especially consider the extent of the university's financial autonomy from the state: "the extent of state funding, the state's oversight and control of the university's fiscal affairs, the university's ability independently to raise funds, whether the state taxes the university, and whether a judgment against the university would result in the state increasing its appropriations to the university." *Id.* The Seventh Circuit has previously held that "Purdue is entitled to Eleventh Amendment immunity." *Id.* at 846.

IPFW is not its own entity but a regional campus of Purdue and IU. It is completely controlled by Purdue, which has full power, authority, and responsibility to manage and operate IPFW for the benefit of Purdue and IU. Purdue is responsible for IPFW's business operations, including its fiscal management and control. IPFW's chancellor is appointed and employed by Purdue (with the approval of IU) and reports to the Purdue president. Purdue appoints and employs all administrative officers, faculty, and staff members. Finally, Purdue charges and collects all tuition and fees related to IPFW.

As this case itself exemplifies, a suit against IPFW is really a suit against Purdue. (*See* Pl.'s Mot. Amend Caption, September 9, 2004, Docket Entry 16 (stating that, in accordance with Ind. Code 20-12-36-4, the proper defendant in this case is the Board of Trustees of Purdue University, not IPFW)). Yet, as noted above, Purdue is immune from damages under the Eleventh Amendment. *Kashani,* 813 F.2d at 845.

Therefore, the Plaintiff's claims for damages under §§ 1981, 1985(3), and 1986 are barred.

However, Purdue is not immune from suit for injunctive relief, which the Plaintiff has requested in his Complaint. *Kashani,* 813 F.2d at 848("[A] suit for prospective injunctive relief is not deemed a suit against the state and thus is not barred by the Eleventh Amendment."). Therefore, the Court must examine whether the Plaintiff is entitled to injunctive relief under 42 U.S.C. §§ 1985(3), and 1986.[5]

(2) *Plaintiff's Claims for Injunctive Relief under §§ 1985(3) and 1986*

The Plaintiff claims that the Defendant conspired with S.S. and V.H. to deprive him of equal protection of the law as provided by the Fourteenth

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[5] Since the Plaintiff has also alleged Title VII claims, which are not barred by the Eleventh Amendment, *see Nanda v. Board of Trustees of Univ. of Ill.*, 303 F.3d 817, 831 (7th Cir. 2002) ("[W]e hold that the 1972 Act validly abrogated the States' Eleventh Amendment immunity with respect to Title VII disparate treatment claims."), the Court will not separately consider the Plaintiff's claim under 42 U.S.C. § 1981, as both Title VII and § 1981 employ the same analysis. *See Alexander v. Wis. Dep't of Health & Family Serv.*, 263 F.3d 673, 682 (7th Cir. 2001).

Amendment, in violation of 42 U.S.C. §§ 1985 (3) and 1986. The Defendant argues that no conspiracy was possible in this case because all the actors belong to the same corporation, and a corporation cannot conspire with itself.

Section 1985(3), although not a source of substantive rights, is a remedial statute that prohibits conspiracies to deprive a person of rights guaranteed by the Constitution or federal laws:

> [i]f two or more persons in any State or Territory conspire…for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws…the party so injured or deprived may have an action for the recovery of damages…

42 U.S.C. § 1985(3). The courts have identified four elements necessary to make out a valid case under § 1985(3):

> (1) a conspiracy; (2) a purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to his person or property or a

> deprivation of any right or privilege of a citizen of the United States.

Quinones v. Szorc, 771 F.2d 289, 291 n.1 (7th Cir. 1985) (citing *United Bhd. Of Carpenters & Joiners of Am. v. Scott*, 463 U.S. 825, 828-29 (1983)).

In this case, the Plaintiff is unable to satisfy the first element, that is, to show that the Defendant conspired with others to deprive him of equal protection of the law. To be a conspirator, the Defendant would have to have a co-conspirator or co-conspirators with whom to conspire. In a corporate conspiracy, co-conspirators must be outside of the corporation. *See Travis v. Gary Cmty. Mental health Ctr., Inc,*. 921 F.2d 108m 110 (7th Cir 1990) ("[I]ntra-corporate discussions lie outside [§] 1985 (3)'s domain."). Yet, all persons accused of conspiring against the Plaintiff-Chancellor Wartell, Dr. Hannah, Dr. Utesch, as well as S.S. and V.H.-worked for the Defendant at the time of the alleged conspiracy.

In passing, the Plaintiff states that *Travis's* intra-corporate conspiracy doctrine would not apply here, because the Defendant's employees have been motivated solely by personal bias. *Cf. Hartman v. Bd. of Trs. Of Cmty. Coll. Dist. 508,* 4 F.3d 465, 470 (7th Cir. 1993) (noting that intra-corporate conspiracy doctrine does not apply where persons are motivated solely by personal bias). The Plaintiff does not expound on the facts that would establish that the Defendant's employees' choice not to reappoint him was motivated solely on the grounds of their personal racial animus against him. He does state, although without any specific evidence, that V.H. was inspired to injure him by strong dislike for him because she received a "B" in his class rather than an "A." But in any case, a dislike of a teacher because of a bad grade is not equivalent to a personal racial bias. As to the remaining persons, the Plaintiff has failed to establish that they were motivated solely by their racial animus so that the Defendant's interests in maintaining quality

education program played no interest at all in their decisions. *See id.* (where the plaintiff has not shown that the accused employees' actions were not at all motivated by the defendant's interests in its education success, the court cannot conclude that the employees' acted solely out of personal bias against the plaintiff, and thus outside of the scope of their employment). Accordingly, the Court cannot find that any alleged agreement among the Defendant's employees to harm the Plaintiff constituted a conspiracy within the meaning of § 1985(3).

Since the Plaintiff is unable to establish the first element under § 1985(3), the Court need not proceed any further.[6] Similarly, the Court does not have to address § the 1986 claim, which to be actionable, requires a violation under § 1985:

> Every person who, having knowledge that any

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[6] Nor could the Plaintiff establish that the Defendant deprived him of equal protections of law (the second requirement of the test). As explained below, the Plaintiff's claim that he was not-reappointed because of discriminatory reasons fails as a matter of law.

> of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages cause by such wrongful act, which such person by reasonable diligence could have prevented...

42 U.S.C. § 1986.

F. Title VII Claim

The Plaintiff sued the Defendant for discrimination on account of race and national origin under Title VII of the Civil Rights Act of 1964, as amended,[7] 42 U.S.C. § 2000e *et seq.*, which prohibits such discrimination: "It shall be an unlawful employment practice for an employer—(1)...to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

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[7] Initially, the Plaintiff also accused the Defendant of retaliation against him for exercising his rights under Title VII. The Defendant moved the Court to dismiss the claim as one that exceeds the scope of the Plaintiff's EEOC charge. The Plaintiff has not responded to the Defendant's arguments and appears to have conceded this claim. Accordingly, the Court will award summary judgment in favor of the Defendant on the Plaintiff's Title VII retaliation claim.

terms, conditions, or privileges of employment, because of such individual's race,...or national origin." 42 U.S.C.A. § 2000e-2. The Plaintiff concedes that he has no direct evidence of discrimination but argues that he can overcome the Defendant's motion for summary judgment through the indirect, burden-shifting *McDonnell Douglas* framework.

The Defendant insists that the Plaintiff can neither establish a *prima facie* case under *McDonnell Douglas* nor show that the Defendant's stated nondiscriminatory reason for his suspension and eventual termination—that the Plaintiff engaged in improper conduct—was merely a pretext for discrimination.

(1) *McDonnell Douglas Test*

The Plaintiff has chosen the *McDonnell Douglas* indirect method to show that the Defendant's decision to not renew a teaching offer was motivated by a prohibited animus. Under this approach, he must first establish a *prima facie* case of race and national origin

discrimination. To do that, he "must demonstrate that: "(1) he belongs to a protected class; (2) his performance met his employer's legitimate expectations; (3) he suffered an adverse employment action; and (4) similarly situated others not in his protected class received more favorable treatment." *Brummett v. Sinclair Broad. Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005).

> If she succeeds in establishing the *prima facie* case of race or national origin discrimination, the burden of production shifts to the defendant to offer a permissible, noninvidious reason for the alleged discrimination. If the defendant meets this production burden, the plaintiff may then rebut that evidence by showing that the employer's reasons are a pretext for discrimination or that the decision was tainted by impermissible, race-based motives. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

Johnson v. Cambridge Indus. Inc., 325 F.3d 892, 897 (7th Cir. 2003)(citations omitted). "Pretext is more than a mistake on the part of the employer; it is a phony excuse." *Hudson v. Chicago Transit Auth.*, 375 F.3d

552, 561 (7th Cir. 2004). If pretext is demonstrated, the case must go to trial. *See Olsen v. Marshall & Ilsley Corp.*, 267 F.3d 597, 601 (7th Cir. 2001).

The Plaintiff has established without difficulty the first and third prongs of the *prima facie* case: he is an African-American from Ghana and he has not been reappointed for the 2004-2005 academic year. However, the second and fourth elements—whether similarly situated others not is his protected class received more favorable treatment that he did and whether his performance met the Defendant's legitimate expectations—require careful analysis, especially, since they are closely intertwined with the pretext analysis. The Court will consider them togeth with the Plaintiff's claim that the Defendant's reasons for firing him were pretextual. *See Olsen v. Marshall & Ilsley Corp.*, 367 F.3d 597, 600 (7th Cir. 2001)(where *prima facie* analysis would overlap substantially with the question of pretext, the court may address the two together).

(a) Similarly Situated Employees

Returning to the *prima facie* case, the Plaintiff may not prevail against the Defendant's motion for summary judgment because he has failed to designate evidence of similarly situated comparators who were treated more favorably than he was. To establish that employees not in the protected class were treated more favorably, the Plaintiff must show that those employees were similarly situated with respect to "performance, qualifications and conduct," *Snipes v. Ill. Dep't of Corrs.*, 291 F.3d 460, 463 (7th Cir. 2002), and that "the relevant aspects of [their] employment situation were nearly identical to [the] alleged comparator[s]." *Nunnery v. Elgin, Joliet & E. Ry.*, 48 F.Supp.2d 1122, 1131 (N.D.Ind. 1999)(citations and quotation marks omitted). "Such a showing normally entails establishing that 'the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would

distinguish their conduct or the employer's treatment of them.'" *Snipes,* 291 F.3d at 463 (quoting *Radue v. Kimberly-Clark Corp.,* 219 F.3d 612, 617-18 (7th Cir. 2000)); *see also Grayson v. O'Neill,* 308 F.3d 808, 819 (7th Cir. 2002)(to meet his burden the plaintiff must demonstrate that there is someone directly comparable to him in all material respects). In addition, the Plaintiff must establish that the similarly situated employees were treated more favorably at the time of the alleged discrimination against him. *Jordan v. City of Gary,* 396 F.3d 825, 834 (7th Cir. 2005).

During his deposition, the Plaintiff identified seventeen current and former IPFW employees that he claims were similarly situated to him but were treated more favorably than he. However, the similarities of which the Plaintiff speaks relate only to his ability to teach, write, and research. The Plaintiff has not shown similarities as to the status of these individuals or any detrimental conduct, similar to his own, that they were accused of. For example, the Plaintiff believes that the

tenured faculty members—Utesch, Cochren, Cothern, Nichols, Murphey, Hickey—are directly comparable to him, but that, unlike him, they were allowed to advance in their academic careers. The Plaintiff is mistaken in three respects: First, at the time of the alleged discrimination against the Plaintiff, the tenured faculty members, by the virtue of their tenure, were not directly comparable to the Plaintiff in all material respects. The Plaintiff was not a tenured professor and was subject to different standards than the tenured ones. Second, the advancement of these tenured members did not take place at the same time that the Plaintiff was not reappointed. Finally, the Plaintiff has not presented evidence that the tenured professors were accused of engaging in inappropriate conduct with students.

As to the remaining eleven employees, the Plaintiff provides no specifics, aside from the fact that Dr. Hickey believed that the Plaintiff's research was comparable to Burg's, Agnes's, and Choi's. The Plaintiff asks the Court to disregard the students'

allegations against him as frivolous and compare him to others only as to his academic abilities. The Court has no right to pick and choose what it wants to compare; rather it is the Plaintiff's burden to show that he and the proffered comparators are similar in all material respects. This he has failed to do. Furthermore, the subject matter of the complaint, that a teach abused his position of authority, is grave, not frivolous.

The Plaintiff also claims that one of the comparators was accused of plagiarism, but, as noted above, fails to provide any evidence of that. (*See supra* at 23 n.4.) Finally, the Plaintiff has failed to explain when and how the remaining eleven employees were treated more favorably than he.

(b) Pretext

The Defendant maintains that the Plaintiff was not reappointed for the 2004-2005 academic year because he was not meeting its legitimate expectations: Dr. Hannah reviewed both Dean Wiener's recommendation for reappointment and Dr. Utesch's

recommendation for nonreappointment, and decided that the accusations about the Defendant's inappropriate behavior outweighed the positive aspects of his employment.[8]

In response, the Plaintiff offers a two-paragraph rebuttal insisting that the Defendant's stated reasons have no basis in fact. He maintains that the allegations against him were unverifiable and unsubstantiated, and that the Court can infer from the falsity of the Defendant's explanations that it is dissembling its discriminatory purpose. The Court disagrees.

The Plaintiff has failed to present enough evidence to cast the shadow of pretext on the Defendant's explanation why he was not reappointed. It is not sufficient for the Plaintiff to show that some or all of the students' allegations about the Plaintiff's inappropriate behavior were made up by those students. It is also insufficient for the Plaintiff to show that

---

[8] This assertion also goes to the Defendant's claim that the Plaintiff was not performing his job satisfactorily.

previous recommendations from Dr. Utesch praised hs abilities and zeal for teaching, and that some faculty members, as well as many student, perceived him as an excellent teacher. *Cf. Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 329 (7th Cir. 2002)("In most cases, when a district court evaluates the question of whether an employee was meeting an employer's legitimate employment expectations, the issue is not the employee's past performance but 'whether the employee was performing well at the time of [his] termination.'" (citation omitted)); *Dey v. Colt Const. & Development Co.*, 28 F.3d 1446, 1460 (7th Cir. 1994)("Our cases also give little weight to statements by supervisors or co-workers that generally corroborate a plaintiff's own perception of satisfactory job performance."). Rather, he must show that Dr. Hannah, the person who made the ultimate decision not to reappoint the Plaintiff, or Dr. Utesch who passed the complaints on to her, made up the students' allegations, did not truly believe them, or found them insignificant.

In a word, the Plaintiff must establish that Dr. Hannah's and Dr. Utesch's reasons for the Plaintiff's non-reappointment were merely made up to cover up their discriminatory reasons.

Yet, the evidence points to the contrary. Even Dean Wiener's recommendation for reappointment was not without some hesitation. She recognized some of the Plaintiff's flaws but believed that his research skills, publications, and his verbal commitment for improvement outweighed them. She was also confident that the Plaintiff was going to correct his interactions with the students during the coming months. Dr. Utesch, on the other hand, noted that the student complaints had become more serious over the past year, compromising all positive aspects of the Plaintiff's work: "female students report inappropriate comments about their appearance," and "[t]he trust and respect of students has been diminished by misuse of power." (Hannah Dep., Ex. 15.)

Dr. Hannah, faced with contradicting recommendations from her subordinates, met with Dean Wiener and Dr. Utesch to discuss their recommendations and reviewed all available documents. She even made sure that Dr. Utesch consulted with Judy Dilorio, IPFW's Affirmative Action Officer and James Ferguson, IPFW's Human Resources Services Director, to insure that all procedures were followed. Then, after considering both sides, she decided against the Plaintiff's reappointment, citing the students' complaints of ineffective teaching and a lack of professionalism, "which have increased over this past year despite verbal and written warnings and efforts at assistance." *Id.*

After the Plaintiff asked Dr. Hannah for a more detailed explanation for her reasons not to reappoint him, she sent him a letter. In the letter, she reiterated her earlier comments and further expanded on her rationale. She noted some of his unprofessional behavior in and out of class and his stated biases

against homosexuals. Dr. Hannah also noted the positive reports about the Plaintiff, but did not think that they compensated for the Plaintiff's faults.

The Plaintiff challenges his non-reappointment only by calling into question the reliability of the students' complaints and by referring to his previous positive evaluations. The Plaintiff, who bears the burden to show pretext, does not provide the Court with a reason to believe that Dr. Hannah or Dr. Utesch simply made up the stories of the students' complaints, by themselves or in collaboration with the students. He refers to Dr. Utesch's conversation with S.S. and V.H. at the racquet club as indication of conspiracy, but he is unable to supply any basis for this claim.[9] Further, he states that V.H. hated the Plaintiff because she received a "B" in his class: "[she] set out a plot to malign him. Utesch and S.S. got on board and set out a course that has resulted in the utter destruction of [the Plaintiff's]

[9]S.S. testified during her deposition that she approached Dr. Utesch with a friend because she was "very upset about it and it was scary to bring-to say what he said." (S.S.'s Dep. At 16).

career in academia." (Pl.'s Resp. at 9). Again, the Plaintiff does not single out any part of the record to support these allegations. Finally, the Plaintiff points to Blakemore's report as a document that exonerates him of S.S.'s and V.H.'s allegations. However, such assertion is a stretch.

In her report, Blakemore did note that some students she interviewed were very supportive of the Plaintiff and had no complaints against him at all. Yet, there were also those who corroborated the complainants' allegations. She wrote: "On balance…the majority of students to whom I spoke provided examples of experiences that were consistent with [S.S's] and [V.H.'s] complaints…I can say…that many of the students and former students to whom I spoke found several aspects of his behavior inappropriate, and that their accounts were startlingly consistent." (Pf.'s Ex. 25 at 2.) Blakemore also stated that she

> would like to express her utmost respect toward [S.S and V.H.] for their courage coming forward with their complaints. I spoke to several other students who believed that they had been harmed by [the Plaintiff], but were afraid to speak, lest their future careers be harmed. I spoke to former students who said that they had wanted to report their concerns about his behavior once they left the university, but they never had, and that they felt distressed and guilty that they had not. Hence the university should applaud those who are willing to come forward with a serious complaint at possible risk to themselves, particularly when they are taking the risk partly for the good of others.

(*Id.* at 3.)

Regarding S.S.'s complaints, Blakemore concluded that, although they were brought too late procedurally, they confirmed a pattern of hostile educational environment the Plaintiff created:

> Because many events reported by [S.S] took place outside the 120day limit, and although plausible, the telephone calls cannot be verified, I find it very difficult to conclude that [S.S.] was specifically the victim of harassment. However, most of her reported experiences are very consistent with those of others, and can be seen as part of a pattern which leads me to concluded that [the Plaintiff] has created a hostile educational environment for students in the Counselor Education Program at IPFW.

(*Id.*)

Regarding V.H.'s complaints, Blakemore determined that four out of the ten accusations were consistent with the overall responses from the persons interviewed: (1) excessive discussion of sexuality in class; (2) discussing performance of other students by name, generally in derogatory fashion; (3) denigrating students' performance publicly; and (4) fear of the Plaintiff, and what he might to do to harm the students academically or professionally. (*Id.* at 9.) This lead Blakemore to find that the Plaintiff "has violated the Purdue University antiharassment policy." (*Id.*) and to recommend that the Plaintiff "be immediately removed from his teaching and practicum supervision responsibilities, and from any supervisory contact with students in the School of Eduation at IPFW." (*Id.* at 10.)

Since the Plaintiff is unable to demonstrate that Dr. Hannah and Dr. Utesch manufactured claims against him, he has not rebutted the Defendant's stated

reasons for his termination. Furthermore, Dr. Utesch's remarks about minorities do not prove pretext. As the Defendant points out, Dr. Utesch's remarks were not sweeping general statements about minorities. Rather, the statements were about specific applicants or a group of applicants who wrote poorly or whose performance was otherwise inferior. Dr. Utesch complained about these individuals and stated his belief that they should not be admitted to the School of Education just because they were minorities. As such, even if considered in the light most favorable to the Plaintiff, the statements do not support an inference that Dr. Utesch or Dr. Hannah made their recommendations to not reappoint the Plaintiff for any improper reason. Similarly, Dr. Utesch's undated statement that "minority students, particularly females, are uncomfortable to deal with because they are quick to invoke the notions of a lawsuit" is too obscure to demonstrate pretext in the Defendant's stated reason for the Plaintiff's non-reappointment. *Cf. Kadas v. MCI Systemhouse Corp.*,

255 F.3d 359, 361 (7th Cir. 2001) (a supervisor's undated statement about older employees, "Bob, you know how hard it is to sell these guys and they just don't look like they work as hard," was too obscure to express prejudice on the basis of age).

What is more, even if questionable, Dr. Utesch's statements must be considered in light of his recommendation to the search committee to consider the Plaintiff for a teaching position at the School of Education. When Dr. Utesch recommended the Plaintiff to the committee, as the Department Chair, he knew that the Plaintiff would be working toward a tenure with the school. He could have bypassed him then but did not. Since he was instrumental in both hiring and firing the Plaintiff, an inference against discrimination on his part, even if limited, exists. *See E.E.O.C. v. Our Lady of Resurrections Med. Ctr.*, 77 F.3d 145, 152 (7th Cir. 1996). ("The same hirer/firer inference has strong presumptive value."); *but cf Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 745 (7th Cir.

1999) (noting that the same-actor inference is unlikely to be dispositive in very many cases because the hiring and firing supervisor "might be unaware of his own stereotypical views of African-Americans at the time of hiring).

Importantly, the Plaintiff has not produced any evidence suggesting Dr. Hannah's racial animus. After meeting with both Dean Wiener and Dr. Utesch and after reviewing available documentation, she exercised the final decision making authority not to reappoint the Plaintiff. She also made sure that Dr. Utesch consulted with Dilorio, IPFW's Affirmative Action Officer, to insure that proper procedures were followed. Dr. Hannah did not believe that the Plaintiff's research and productivity compensated for his flaws, and the Plaintiff has not been able to shown anything that would contradict that.

The Court will not second guess Dr. Hannah's legitimate business reason and will not assume the role of a super personnel department. *See Ajayi v. Aramark*

Bus. Servs., Inc., 336 F.3d 520, 532 (7th Cir. 2003) ("Above all, we are mindful that courts do not sit as super personnel departments, second-guessing an employer's facially legitimate business decisions."). Tthe evidence before the Court does not suggest a pretext for discrimination. Accordingly, the Plaintiff cannot prevail on his Title VII claim.

G. State Law Claims

Along with the federal claims, the Plaintiff has alleged four causes of action under the Indiana Toro Claims Act (ITCA): intentional infliction of emotional distress, negligent infliction of emotional distress, negligent supervision, and wrongful termination. The Defendant argues that such claims are improper because the Plaintiff did not provide a timely tort claims notice as required by the Act. The Plaintiff disagrees and maintains that he "substantially complied" with the ITCA.

Each of the Plaintiff's four claims is subject to ITCA's procedural and substantive requirements. *See*

Bienz v. Bloom, 674 N.E.2d 998, 1003 (Ind. Ct. App. 1996) ([O]ur supreme court has held that the Act applies to all torts."). Compliance with the ITCA is a prerequisite to pursuing a tort claim against a state university, such as the Defendant, regardless of whether suit is filed in state or federal court. One of ITCA's requirements is to give notice of tort claims to the defendant's government body, in this case the Defendant itself, within 180 days after the alleged losses occur. *See* Ind. Code § 34-13-3-8(a); § 34-6-2-110(7); *see also Kelly v. City of Michigan City*, 300 F. Supp. 2d 682, 689 (N.D. Ind. 2004) (granting summary judgment against plaintiff who failed to file tort claims notice within 180 days of the alleged violation).[10] "The

[10]It is important to note that "the notice of claims under Ind. Code 34-13-3-8 regarding a political subdivision or municipal corporation is not affected by its status as a state agency for purposes of Eleventh Amendment immunity. This is illustrious in cases where universities and colleges are arms of the state for purposes of Eleventh Amendment immunity but for purposes of notice are considered political subdivisions or municipal corporations." *Kelley v. City of Michigan City*, 300 F. Supp. 2d 682, 689 (N.D. Ind. 2004) (citing *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283 (Ill. 1989); and *Van Valkenburg v. Warner*, 602 N.E.2d 1046 (Ind. Ct. App. 1992)).

purpose of the notice is to provide an opportunity for [the defendant] to investigate, determine liability and prepare a defense to the tort claim." *Orem v. Ivy Tech State College*, 711 N.E.2d 864, 869 (Ind. Ct. App. 1999). According to the explicit language of the ITCA, a plaintiff's state claims accrue when the alleged losses occur. Ind. Code § 34-13-3-8(a). "Whether a party has complied with the notice requirements of the Act is a question of law to be determined by the court." *Orem*, 711 N.E.2d at 869.

In this case, the Plaintiff received a notice of non-reappointment from Chancellor Wartell on April 3, 2003. the notice stated that the Plaintiff's employment with the Defendant would expire on May 12, 2004. The Plaintiff then requested that Dr. Hannah provide a detailed explanation as to why he was not reappointed. Dr. Hannah responded to his request on May 15, 2003. Next, the Plaintiff initiated a grievance process and participated in Chancellor Wartell's investigation into the students' complaints against him. The investigation

concluded on June 30, 2003, and, in August 2003, the Plaintiff was ins[illegible]ed to conduct his research outside the university campus. On May 12, 2004, the Plaintiff's employment with IPFW ended. On October 5, 2004, the Plaintiff sent a notice to the Defendant's governing body regarding his tort claims under ITCA.

The Plaintiff asserts that his losses as a result of the Defendant's tortuous acts did not occur until May 12, 2004, when he was terminated from the school. Accordingly, he argues that the torts claim notice was timely so long as it was sent before November 9, 2004, that is, within 180 days after May 12, 2004. Such assertion is inconsistent with two of the Plaintiff's four claims: intentional infliction of emotional distress and negligent infliction of emotional distress. The Plaintiff cannot sincerely maintain that his losses, as a result of the Defendant's alleged intentional and negligent infliction of emotion distress, did not occur until May 12, 2004. His own testimony demonstrates that he was upset as soon as he was accused of sexually harassing

his students and informed that his contract would not be renewed. This happened on April 3, 2003, and the matter was finally settled around August 2003. The Plaintiff's claims regarding the infliction of emotional distress do not concern the loss of income, which he did not suffer until May 12, 2004, but the loss of emotional stability, which allegedly began a year earlier. Therefore, the Plaintiff's October 5, 2004, tort notice regarding those two claims was late.

In contrast, the notice regarding the Plaintiff's negligent supervision and wrongful termination claims was timely. Under these claims, one of the Plaintiff's losses-the loss of employment-occurred on May 12, 2004. Therefore, a notice regarding these claims filed on October 5, 2004, fell within 180 days of the Plaintiff's alleged losses, as required by the ITCA. Nevertheless, the Plaintiff may not proceed to trial on these claims because they fail on their merits. The first two claims, even if they were not procedurally barred,

would have also failed on their merits, as the Court will now explain.

(1) ***Intentional Infliction of Emotional Distress***

In Count V of the Complaint, the Plaintiff states that the Defendant's decision to not reappoint him was "in wanton disregard of the rights and feelings of Plaintiff and constitutes despicable conduct." (Pf's Comp. at 14.) The Defendant moved for summary judgment on this claim, arguing that the Plaintiff has not demonstrated that the Defendant engaged in extreme and outrageous conduct. The Plaintiff insists that the totality of the circumstances in this case reveals the contrary.

In Indiana, to maintain a cause of action for intentional infliction of emotional distress, a plaintiff must show that the defendant intentionally engaged in extreme and outrageous behavior and caused severe emotional distress to the plaintiff." *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991) (citing Restatement

(Second) of Torts § 46)). Conduct is extreme and outrageous

> only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exlaim, "Outrageous!"

Powdertech, Inc. v. Joganic, 776 N.E.2d 1251, 1264 (Ind. Ct. App. 2002) (citations omitted).

The Plaintiff has not presented any evidence that he indeed suffered severe emotional distress as a result of his non-reappointment or the accusations brought against him. He vaguely refers to his outburst during a deposition, which, according to him, demonstrates the trauma he suffered. Besides that uncited reference, he presents no facts that would allow the Court to conclude that he has endured significant emotional pain.

But more importantly, the Defendant's decision to not reappoint him was not extreme or outrageous.

As explained above, the Plaintiff was accused of inappropriate behavior with his students and of unsatisfactory teaching, which resulted in eventual termination of his employment. IPFW initiated an investigation and interviewed numerous people. The investigator concluded that the students' allegations against the Plaintiff were credible and that the Plaintiff violated the university's antiharassment policy. In light of these facts, the Defendant's decision to prohibit the Plaintiff from attaining tenure is not the kind of action that makes one cry, "Outrage!" *Cf. Joganic,* 776 N.E.2d 1251, 1264 (Ind. App. 2002) (Here, [the plaintiff's] claim of intentional infliction of emotional distress fails as a matter of law because [the defendant's] act of firing him pursuant to its disciplinary policy does not constitute extreme and outrageous conduct.").

(2) ***Negligent Infliction of Emotional Distress***

In Count VI of the Complaint, the Plaintiff claims that the Defendant negligently inflicted emotional distress upon him when it terminated him as

a result of false sexual harassment accusations. He claims that he sustained the kind of emotional trauma that is normally expected to occur in a reasonable person who has been discharged under the same circumstances. The Defendant insists that the Plaintiff has not presented any evidence of the purported emotional trauma.

To recover under the theory of negligent infliction of emotional distress, "a plaintiff must satisfy the 'impact rule.'" *Joganic,* 776 N.E.2d at 1263. Before 1991, under the impact rule, a plaintiff had to show that the impact caused him physical injury. However, Indiana Supreme Court, in *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991), reduced the physical injury requirement to "emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person." *Id.* at 456. "The modified impact rule maintains the requirement that the plaintiff demonstrate that he or she suffered a direct physical impact. However, now, the

impact need not cause a physical injury to the plaintiff and the emotional trauma suffered by the plaintiff need not result from a physical injury caused by the impact." *Joganic*, 776 N.E.2d at 1263. "[T]he direct impact is properly understood as being 'physical' in nature. *Id.* (citing *Ross v. Cheema*, 716 N.E.2d 435, 437 (Ind. 1999)).

The Plaintiff has failed to evince that he sustained a direct physical impact during his termination from the university or, as explained in the previous section, that he suffered a serious emotional trauma. Accordingly, his claim for negligent infliction of emotional distress must fail.

(3) *Negligent Supervision*

In Count VII of the Complaint, the Plaintiff claims that the Defendant "negligently failed to train it supervisors and administrative personnel regarding nondiscriminatory practices as required by the laws of the State of Indiana and the United States." (Pf.'s Comp. at 15.) In its motion for summary judgment, the

Defendant argues that, as a governmental entity it is statutorily immune from claims for negligent hiring and supervision because such claims fall within the discretionary function of governmental entities. The Plaintiff responds that the Defendant's decision not to reappoint him is not protected by statutory immunity because it did not constitute a policy consideration.

In this latter argument, the Plaintiff reveals some confusion as against whom he brings his negligent supervision claim. His claim is against the Defendant for negligent supervision, that is, for is failure to properly train its supervisors regarding fair employment practices, not against Dr. Utesch, Dr. Hannah, and Chancellor Wartell for negligently terminating him. Therefore, in evaluating the Plaintiff's claim, the Court will consider the Defendant's responsibility to properly train its supervisors, not their actual conduct.

Although governmental agencies may be liable under the Indiana Tort Claims Act, no such liability

exists for "the performance of any discretionary function." Ind. Code § 34-13-3-3(7). However, the Court need not decide whether the immunity applies to the Defendant, for even if it does not, the Plaintiff has not presented any facts that would raise a triable issue of fact as to his negligent supervision claim. The Plaintiff neglects to point out what the Defendant did or did not do that constituted negligent supervision of Dr. Utesch, Dr. Hannah, and Chancellor Wartell. Without evidence of the Defendant's underlying offense, all considerations of immunity are moot. At the summary judgment junction, the Plaintiff may not rely only on the bare assertions of his pleadings. *See* Fed. R. Civ. P. 56(e); *Donovan v. City of Milwaukee,* 17 F.3d 944, 947 (7th Cir. 1994) (once a properly supported motion for summary judgment is made, the non-moving party cannot resist the motion and withstand summary judgment by merely resting on its pleadings; instead, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific

facts to establish that there is a genuine issue for trial"). Accordingly, regardless of whether statutory immunity applies to the Defendant, the Plaintiff's negligent supervision claim must fail.

(5) Wrongful Termination

In Count VIII of the Complaint, the Plaintiff alleged that he was wrongfully terminated when he voiced his concerns about racial disparity in the university's admissions to the Counselor Education Program. The Defendant moved for summary judgment on this claim, and the Plaintiff has not disputed its contentions. Accordingly, the Court will enter summary judgment for the Defendant regarding the Plaintiff's wrongful termination claim. *See Culver v. Gorman & Co.*, 416 F.3d 540, 550 (7th Cir. 2005) (finding that unsupported and undeveloped arguments and claims are waived).

CONCLUSION

As explained in this Opinion and Order, the Court GRANTS in PART and DENIES in PART the Defendant's Motion to Strike [DE 44]. In addition, the

Court GRANTS the Defendant's Motion for Summary Judgment [DE 33].

Finally, the Defendant's Motion to Bifurcate Damages Issues [DE 54] and Plaintiff's Motion to Clarify Court's Preliminary Ruling [DE 64] are rendered MOOT.

SO ORDERED on November 9, 2005.

s/ Theresa L. Springmann
THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT

(2)

No. 06-852

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

GABE KERI,

Petitioner,

v.

BOARD OF TRUSTEES OF
PURDUE UNIVERSITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT BOARD OF TRUSTEES OF PURDUE UNIVERSITY

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QUESTION PRESENTED

Petitioner frames four (4) questions in his Petition for Writ of Certiorari. Respondent objects to the consideration of Petitioner's Questions II and IV because Petitioner failed to raise any arguments regarding Respondent's alleged violation of its own policies and procedures or the consideration of "after-acquired evidence" in the proceedings below.

The district court and the court of appeals agreed that Respondent was entitled to the entry of summary judgment on Petitioner's claim of race and national origin discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, because Petitioner failed to establish a *prima facie* case under the standards articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Respondent submits that the question presented is:

Whether Petitioner has presented a compelling reason for this Court's review of the judgment below.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding are Petitioner, Dr. Gabe Keri, and Respondent, The Trustees of Purdue University. The Trustees of Purdue University is the body corporate established by the State of Indiana to govern the conduct of students, faculty, employees, and others while upon the property owned, used, or occupied by Purdue University, Indiana's land-grant institution of higher education. *See* IND. CODE § 20-13-1-1-2(a)(2).

The Petition for Writ of Certiorari's caption indicates that there are additional respondents to the Petition. There are not. Petitioner originally filed suit against "John Does 1 through 5," but the district court entered summary judgment on each individual claim, and Petitioner did not appeal the district court's determination in that regard. (Pet. App. at 1a, fn.1).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
SUMMARY OF REASONS FOR DENYING THE PETITION	1
STATEMENT OF THE CASE	4
I. Statement of Facts	4
II. Course of Proceedings	10
REASONS FOR DENYING THE PETITION	14
I. The Seventh Circuit conducted a proper *de novo* review of the summary judgment record	14
II. The courts below properly applied *McDonnell Douglas*	17
III. Petitioner did not argue that an alleged violation of an internal policy permitted a favorable pretext inference, and the courts below did not resolve that question	21
IV. Respondent did not offer "after-acquired" evidence as support for its decision not to reappoint Petitioner, and the courts below did not consider "after-acquired" evidence in their Title VII analysis	22
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)..... 15

Bio v. Federal Express Corp., 424 F.3d 593 (7th Cir. 2005)..... 19

Byrd v. Ronayne, 61 F.3d 1026 (1st Cir. 1995) 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 15

City of Springfield v. Kibbe, 480 U.S. 257 (1987).....22, 23

Conward v. The Cambridge School Committee, 171 F.3d 12 (1st Cir. 1999).....18, 19

Dandy v. United Parcel Service, 388 F.3d 263 (7th Cir. 2004)..... 19

Graham v. Long Island R.R., 230 F.3d 34 (2d Cir. 2000)..... 19

Hiatt v. Rockwell Intern. Corp., 26 F.3d 761 (7th Cir. 1994)..... 19

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).....17, 19

McDonald v. Vill. of Winnetka, 371 F.3d 992 (7th Cir. 2004)..... 19

McDonnell Douglas v. Green, 411 U.S. 792 (1973).....2, 12, 13, 17, 21

McMillian v. Svetanoff, 878 F.2d 186 (7th Cir. 1989)..... 19

Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992)..... 20

Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507 (D.C. Cir. 1995)..... 20

TABLE OF AUTHORITIES – Continued

Page

Patterson v. Avery Dennison Corp., 281 F.3d 676 (7th Cir. 2002) 19

Pennsylvania Dep't. of Corrections v. Yeskey, 524 U.S. 206 (1998) 22, 23

Pivirotto v. Innovative Systems, Inc., 191 F.3d 344 (3d Cir. 1999) 20

Radue v. Kimberly-Clark Corp., 219 F.3d 612 (7th Cir. 2000) 19

Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) 21

Stanback v. Best Diversified Products, Inc., 180 F.3d 903 (8th Cir. 1999) 20

Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981) 17, 21

RULES

FED. R. CIV. P. 15(c) 11

FED. R. CIV. P. 56 2

FED. R. CIV. P. 56(e) 15

SUP. CT. R. 10 1

STATUTES

IND. CODE § 20-13-1-1-2(a)(2) ii

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 ..... 10, 11, 13

42 U.S.C. § 1985(3) 3, 10, 11, 13

42 U.S.C. § 1986 ..... 3, 10, 11, 13

42 U.S.C. § 2000e, *et seq.* i

OPINIONS BELOW

Respondent states that Petitioner's citation of the opinions below is accurate, but states that the copies of Petitioner's Petition for Writ of Certiorari that were served upon Respondent did not include a separate reproduction of the Opinion and Order of the district court in an "App. B" as described by Petitioner. The court of appeals' decision, which is reproduced in the Appendix, incorporates the "Opinion and Order" of the district court, in its entirety, beginning at p. 5a of the Appendix and continuing through p. 88a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2006. The Petition for Writ of Certiorari was filed on November 12, 2006, and was docketed on December 20, 2006. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

SUMMARY OF REASONS FOR DENYING THE PETITION

Respondent, The Trustees of Purdue University, ("Respondent") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Seventh Circuit Court of Appeals' opinion affirming the district court's entry of summary judgment in Respondent's favor on Petitioner's Title VII claim of race and/or national origin discrimination. Petitioner has presented no compelling reason for this Court to grant his Petition. SUP. CT. R. 10.

Petitioner argues that the Seventh Circuit and the district court each misapplied the standard of review mandated by FED. R. CIV. P. 56. (Pet. at 9, 10). His argument can fairly be summarized as, "I lost, therefore the courts below misapplied the standard of review." His conclusory argument borders on the frivolous and is manifestly unworthy of this Court's review.

Similarly, Petitioner claims that the courts below misapplied the familiar *McDonnell Douglas* analytical framework when they found that none of Petitioner's seventeen (17) allegedly comparable employees were similarly situated. (Pet. at 15-17). Petitioner claims that the alleged misapplication presents a split among the circuits. (*Id.*). However, he never articulates how the instant case conflicts with cases decided in other circuits. This case is fully consistent with the cases cited by Petitioner, and this question is, again, unworthy of Supreme Court review.

Petitioner's contention that the courts below failed to give the Petitioner the benefit of a favorable pretext inference is not properly before this Court because the courts below held that Petitioner failed to establish a *prima facie* case of discrimination. Resolution of the pretext question is, therefore, unnecessary to sustain the judgment below. Moreover, Petitioner never argued in the proceedings below that an alleged violation of a policy occurred, or that any alleged violation was evidence of pretext. The Petition does not contain any explanation of Petitioner's contention that Respondent violated its internal policies or procedures. Thus, he has waived this Court's consideration of this question.

Petitioner's question regarding the propriety of the consideration of "after-acquired evidence" is also raised for the first time in this Petition. This Court should deem the issue waived by Petitioner because he never argued that the formal internal complaints filed against him were improperly considered by the decision-makers who decided not to reappoint him. Indeed, the evidence is undisputed that the non-reappointment decision was made before any formal internal complaint was lodged against Petitioner. The result of the University's investigation of the formal complaints was that Petitioner was assigned to a 100% research position, and was not permitted to use his University office for the remainder of his employment.

The University's investigation of the formal complaints was considered by the courts below because the Petitioner asked the courts below to consider the investigation. Petitioner's complaint includes allegations that the investigation constituted a conspiracy to deprive him of his civil rights under 42 U.S.C. §§ 1985(3), 1986. (Pet. App. at 51a-52a). Petitioner designated evidence regarding the investigation, and argued that the investigation created a triable issue of fact because the investigator could not substantiate each of the claims filed against Petitioner.

Respondent did not rely upon evidence acquired by the University investigator after the decision to not reappoint Petitioner was made to determine that Petitioner was not meeting Respondent's legitimate employment expectations, and neither court below relied upon "after-acquired" evidence in rendering its judgment.

In sum, Petitioner has plainly failed to carry his burden of demonstrating that there is a compelling reason for this Court to grant the Petition. Petitioner simply

seeks another review of the summary judgment record, which the courts below unanimously found insufficient to establish a *prima facie* case of discrimination. The judgment of the courts below is fully consistent with the precedent of this Court, and with the decisions of the federal circuit courts of appeals. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. Statement of Facts[1]

Petitioner is a former tenure-track Assistant Professor employed by Respondent,[2] in the School of Education at Indiana University Purdue University at Fort Wayne ("IPFW"). (Pet. App. at 2a). Petitioner was employed by Respondent on a series of academic-year appointments, beginning in May, 2000. (Pet. App. at 2a). Petitioner's appointment was reviewed annually by his immediate supervisor, William Utesch ("Utesch"), the Acting Chair of Professional Studies and Director of the School of Education

[1] Petitioner provides the Court with a "Statement of Facts," which he contends are "drawn from the Petitioner's Brief filed on his behalf in the Seventh Circuit Appeal." (Pet. at 2). Petitioner provides no citation (and attaches no support) for any alleged "fact." Respondent's statement of facts relies upon the district court's recitation of undisputed material facts.

[2] The Petition for Writ of Certiorari's caption indicates that there are additional respondents to the Petition. There are not. Petitioner also filed suit against "John Does 1 through 5," but the district court entered summary judgment on each individual claim, and Petitioner did not appeal the district court's determination in that regard. (Pet. App. at 1a, fn.1).

Counseling Program and by Roberta Wiener ("Wiener"), Dean of the School of Education. (Pet. App. at 2a).

Petitioner's performance was reviewed annually. (Pet. App. at 2a). Utesch reviewed materials submitted by Petitioner and evaluated Petitioner by assessing his performance in three (3) areas: teaching, research and service. (Pet. App. at 26a). Satisfactory performance in all three areas assured Petitioner's reappointment for the following academic year. (Pet. App. at 26a-27a). The materials submitted by Petitioner were also reviewed by Wiener, who conducted her own evaluation of Petitioner's record and performance and made her own recommendation regarding reappointment. (Pet. App. at 27a). Wiener's evaluation was conducted with reference to the same criteria (*i.e.* teaching, research and service) as Utesch's evaluation. (Pet. App. at 27a).

Both Utesch's and Wiener's recommendations and the faculty member's materials were then forwarded to the Vice Chancellor of Academic Affairs, Susan Hannah ("Hannah"). (Pet. App. at 27a). Hannah then reviewed the materials and made her own recommendation regarding reappointment, using the same criteria as Wiener and Utesch. (Pet. App. at 27a). Hannah, in turn, forwarded all of the recommendations and the materials submitted by Petitioner to the Chancellor, Michael Wartell ("Wartell"). (Pet. App. at 27a). Wartell then made his final decision based upon his review of the materials, and the recommendations of Utesch, Wiener and Hannah.[3] (Pet. App. at

[3] Petitioner's statement that Wartell makes a "recommendation" for reappointment based upon the recommendations of Utesch, Wiener and Hannah is a misstatement of fact. As Chancellor of IPFW, Wartell's decision is final and is based upon the recommendations of Utesch,

(Continued on following page)

27a). Wartell used the same criteria for evaluation as Utesch, Wiener and Hannah. (Pet. App. at 27a).

Petitioner received satisfactory evaluations and was reappointed for academic year 2001-2002 in January, 2001, about six months after he began working at IPFW. (Pet. App. at 28a). Petitioner was next evaluated eight months later, received a second satisfactory evaluation, and was reappointed for the 2002-2003 academic year. (Pet. App. at 29a).

Beginning in November, 2001, Utesch began receiving student complaints regarding Keri's classroom behavior. (Pet. App. at 30a). Utesch continued to receive complaints from students in both oral and written form throughout the 2002-2003 academic year. (Pet. App. at 32a). From November, 2001 through March, 2003, Utesch received six written complaints, two from students who requested that their identity be protected. (Pet. App. at 33a).

The complaints received by Utesch ranged from a report that Petitioner failed to supervise his practicum students to allegations of inappropriate classroom discussions and included reports of "gay bashing" and "sexual harassment of a student." (Pet. App. at 32a). Utesch met with Petitioner to discuss the student complaints and initially believed that the situation would improve over time. (Pet. App. at 30a-31a).

Petitioner was next evaluated for reappointment beginning in March, 2002. (Pet. App. at 31a). His 2002 evaluation noted that Petitioner responded to student

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Wiener and Hannah, as well as Wartell's own review of the materials. (App. at 17a).

concerns and student feedback, and has sought multiple measures of his teaching to further his growth. (Pet. App. at 31a). Petitioner was reappointed for the 2003-2004 academic year on April 4, 2002. (Pet. App. at 32a).

During the academic year 2002-2003, student complaints against the Petitioner continued and Utesch referred some students to Dean Wiener. (Pet. App. at 33a). In March, 2003, two graduate student employees approached Utesch and reported that Petitioner engaged in inappropriate behavior and had made inappropriate comments to one of them during her interview for a clinic manager position. (Pet. App. at 32a). The inappropriate comments included Petitioner's recommendation that one of the student employees "wear tighter pants." (Pet. App. at 32a). The same student employee also reported that Petitioner told her that "she didn't have big enough boobs because she was white." (Pet. App. at 32a). The inappropriate behavior also included Petitioner's "gay bashing" and disparaging Catholics during classroom lectures. (Pet. App. at 32a). The student employee complaints were consistent with those that Utesch received from other students in other classes taught by Petitioner. (Pet. App. at 32a).

Based on the complaints received by Utesch from a number of students, including the most serious allegations received from the two graduate student employees in spring 2003, Utesch recommended non-reappointment of Petitioner for the 2004-2005 academic year. (Pet. App. at 33a). Utesch concluded that student complaints were becoming more serious and that Utesch's prior meetings with Petitioner did not result in the desired change in behavior. (Pet. App. at 33a). Utesch noted that Petitioner

continued to be productive in research and service, but that his teaching was unsatisfactory. (Pet. App. at 34a).

Wiener also referenced the several student complaints received regarding the Petitioner in her 2003 evaluation of his performance. (Pet. App. at 35a-36a). She noted that Human Resources and the Affirmative Action officer had been notified of this problem. (Pet. App. at 35a-36a). Wiener expressed reservations but recommended Petitioner's reappointment due to his record of productive research and publications, and his verbal commitments to change his teaching deficiencies. (Pet. App. at 36a).

Hannah met with both Wiener and Utesch to discuss their recommendations and reviewed all available documentation. (Pet. App. at 36a). Hannah considered all materials submitted to her by Utesch, Wiener and Petitioner.[4] (Pet. App. at 36a). Hannah recommended non-reappointment on April 3, 2003. (Pet. App. at 36a-37a). Chancellor Wartell concurred with Hannah's recommendation. (Pet. App. at 37a). Petitioner was informed on or about April 3, 2003 that he would not be re-appointed for the 2004-2005 academic year. (Pet. App. at 37a).

Shortly after Petitioner received notice that he had not been recommended for re-appointment, two graduate student employees, Suzanne Swinehart ("Swinehart") and Virginia Hartman ("Hartman") each filed a formal complaint under University procedures,[5] claiming that Petitioner had

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[4] Petitioner's statement that "Dr. Hannah was not willing to look at any documentation Dr. Keri had brought" is a misstatement of the facts in the summary judgment record. (Pet. at 3-4).

[5] Petitioner states that Hartman, Swinehart and Utesch "met and discussed" Dr. Keri at an off-campus racquet club, and that "[s]uch conduct is also contrary to IPFW's policies and procedures." (Pet. at 4).

(Continued on following page)

harassed and discriminated against them in both the classroom and in their work as graduate assistants. (Pet. App. at 39a-40a). Respondent investigated the complaints in accordance with applicable University procedures. (Pet. App. at 40a). Elaine Blakemore ("Blakemore") was assigned to investigate the complaints and interviewed all parties to the complaints, Utesch and two other faculty members in the Department of Education Studies, and thirteen (13) student and former student witnesses from the Counselor Education Program from four different academic "cohorts."[6] (Pet. App. at 40a).

Blakemore issued a detailed, written report with extensive findings on both complaints. (Pet. App. at 40a). She noted that Petitioner was bewildered by all of the allegations against him and that several witnesses were supportive of Petitioner. (Pet. App. at 40a-41a). She also reported that several students supported and corroborated Swinehart and Hartman's complaints. (Pet. App. at 41a-42a).

Blakemore found that Petitioner subjected Hartman to a hostile educational environment and that Petitioner harassed Hartman. (Pet. App. at 42a). Blakemore did not conclude that Petitioner discriminated against Hartman

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Petitioner's allegation is a misstatement of fact to the extent it is read to imply that Hartman, Swinehart and Utesch convened at the racquet club for the purpose of discussing Petitioner. Petitioner's allegation that the meeting "is contrary to IPFW's policies and procedures" is false, and finds no support in the summary judgment record.

[6] A "cohort" is defined as a group of students who begin the program during a given academic year and progress through the program together as a group. Petitioner's statement that the investigator "spoke to a cohort" (*i.e.* a "single" cohort) of current and former students is a misstatement of fact. (Pet. at 4).

on the basis of Hartman's gender, noting that other students, both male and female, were treated similarly by Petitioner. (Pet. App. at 42a). Blakemore ultimately concluded that Swinehart failed to timely file her Complaint, but noted that Swinehart's complaints were consistent with reports of other students whom Blakemore interviewed. (Pet. App. at 42a).

Blakemore recommended that Respondent honor Petitioner's academic year 2003-2004 appointment, but that it remove Petitioner from his teaching and practicum supervision responsibilities. (Pet. App. at 43a). Blakemore presented her report to the University's Committee on Equity, and the Panel concurred with the Blakemore's findings and conclusions. (Pet. App. at 43a). Chancellor Wartell assigned Petitioner to a 100% research position during the 2003-2004 academic year. (Pet. App. at 43a).

II. Course of Proceedings

Petitioner filed an eight-count complaint in the district court, asserting national origin and race discrimination claims under Title VII, a Title VII retaliation claim, claims under 42 U.S.C. §§ 1981, 1985(3) and 1986 and pendent state law claims of intentional and negligent infliction of emotional distress, negligent supervision and common law wrongful termination. (Pet. App. at 5a, 47a). Petitioner alleged that the decision to not reappoint him was discriminatory and/or in retaliation for his reporting alleged discriminatory admission practices by Respondent. (Pet. App. at 5a). He further alleged that Respondent's investigation of Swinehart's and Hartman's internal complaints against him were discriminatory and part of a

conspiracy to smear Petitioner's reputation. (Pet. App. at 6a).

Respondent moved for summary judgment on each of Petitioner's claims, arguing that, as an instrumentality of the State of Indiana, Respondent was immune from liability for damages on Petitioner's claims under 42 U.S.C. §§ 1981, 1985(3) and 1986. (Pet. App. at 48a). Respondent also argued that the claims against Defendants identified only as "John Does 1 through 5," were barred by the statute of limitations, and Petitioner had no right to amend his Complaint, such that the individual claims would relate back under Federal Rule of Civil Procedure 15(c). (Pet. App. at 48a). Finally, Respondent argued that an entity could not conspire with itself, and, therefore, Petitioner's § 1985(3) claim failed, as a matter of law. (Pet. App. at 52a).

Respondent argued that Petitioner failed to establish a *prima facie* case of discrimination or retaliation under Title VII. (Pet. App. at 56a-57a). Specifically, Petitioner was unable to establish that he was meeting his employer's legitimate employment expectations, and could not identify similarly situated comparators who were treated more favorably than he was treated under the same or similar circumstances. (Pet. App. at 60a). Respondent also argued the existence of a legitimate, non-discriminatory reason to not reappoint Petitioner. (Pet. App. at 63a-64a). Finally, Respondent argued that it was entitled to the entry of summary judgment on each of Petitioner's pendent state law claims. (Pet. App. at 75a).

Petitioner responded to Respondent's motion for summary judgment, and argued that he was meeting Respondent's legitimate expectations. (Pet. App. at 64a). Petitioner

also identified seventeen (17) allegedly comparable employees. (Pet. App. at 61a). Finally, he submitted that Respondent's legitimate, non-discriminatory reason for his non-reappointment was pretextual because the allegations of his inappropriate behavior and ineffective teaching had no basis in fact.[7] (Pet. App. at 64a).

Respondent replied to Petitioner's brief in opposition and moved to strike several exhibits designated as "evidence" in support thereof.[8] Petitioner opposed Respondent's Motion to Strike, and Respondent replied to Petitioner's opposition. The district court struck fifteen (15) of the seventeen (17) challenged statements, and Petitioner appealed nine (9) of these rulings. The Seventh Circuit upheld each evidentiary ruling, and Petitioner does not seek review of these decisions in his Petition. (Pet. App. 11a-23a).

The district court entered summary judgment on each of Petitioner's claims against the Respondent. (Pet. App. at 48a). Using the analytical framework articulated by this Court in *McDonnell Douglas,* the district court concluded that Petitioner failed to establish the existence of a *prima*

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[7] Petitioner never argued that Respondent improperly considered "after-acquired evidence," or that the Respondent violated its policies and procedures such that the Court should find a reasonable juror could infer that its stated reasons for non-reappointment were pre-textual. Respondent submits that Petitioner has, therefore, waived the review of these questions in this Court.

[8] For example, Respondent moved to strike the deposition testimony of Josue Njock Libii, including his testimony that Utesch "berated" Dr. Keri with inappropriate comments about minorities. That testimony was stricken by the District Court, and Petitioner did not appeal this ruling. (Pet. App. at 19a-21a). Petitioner's reliance on the stricken testimony in his Petition for Writ of Certiorari is improper. (Pet. at 3).

facie case of discrimination. (Pet. App. at 57a-63a). Specifically, the district court found that Petitioner failed to establish the existence of similarly situated comparators, and further failed to establish that he was meeting Respondent's legitimate employment expectations. (Pet. App. at 63a-64a, 73a-75a). The district court further found that Respondent offered a legitimate, non-discriminatory reason for not reappointing Petitioner, and that Petitioner failed to establish that the reason was pretextual. (Pet. App. at 75a).

Petitioner appealed the district court's entry of summary judgment on his claims under 42 U.S.C. §§ 1981, 1985(3) and 1986, as well as his Title VII discrimination claim and three of his four pendent state claims. Petitioner did not appeal the entry of summary judgment on his Title VII retaliation claim or his common law wrongful discharge claim. (Pet. at 1-20).

The Seventh Circuit Court of Appeals affirmed the district court in all respects, and adopted the "excellent opinion of the district court." (Pet. App. at 4a). The Seventh Circuit expressly noted that Petitioner "had failed to establish his prima facie case." (Pet. App. at 3a) (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802-04 (1973). The court of appeals noted that "there was a lack of evidence that [Petitioner] was meeting the legitimate expectations of his employer." (Pet. App. at 3a). The court of appeals further agreed that the summary judgment record lacked evidence of similarly situated employees who were treated more favorably. (*Id.*).

The appellate court recognized that Petitioner identified seventeen (17) allegedly comparable employees but noted that the record established that many of them were

"subject to a separate and entirely different means of oversight, making them dissimilarly situated." (Pet. App. at 4a). Regarding the remainder of the allegedly comparable employees, the Seventh Circuit noted that "there was no evidence whatsoever that the remaining employees were supervised by Utesch or had ever stood accused of the same or similar conduct as [Petitioner]." (Pet. App. at 4a). Finally, the Seventh Circuit noted that Petitioner "failed to explain when and how the non-tenured employees were treated more favorably than he." (Pet. App. at 4a).

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit conducted a proper *de novo* review of the summary judgment record.

Petitioner argues that the Seventh Circuit "misapplied the standard of review dictated by the Supreme Court" because it "did not weigh all of the evidence and considered only the evidence favoring the District Court's findings." (Pet. at 8). Essentially, Petitioner argues that he designated some evidence, and the Seventh Circuit affirmed the entry of summary judgment. Thus, Petitioner argues that the Seventh Circuit misapplied the standard of review. Petitioner's argument regarding a purported "misapplication" of the standard of review amounts to nothing more than question-begging, and offers no compelling reason for this Court's review.

Petitioner's contention that the courts below "took all of Respondent's assertions as factual and clearly appear to draw all reasonable inferences adversely to Petitioner" is demonstrably false. (Pet. at 10). Each court concluded that

Petitioner failed to establish two essential elements of his *prima facie* case. (Pet. App. at 3a, 36a, 38a). Each court found that Petitioner failed to carry his burden of establishing the existence of similarly situated employees. (Pet. App. at 4a, 36a). Each court found that Petitioner failed to establish that he was meeting Respondent's legitimate employment expectations for employees. (Pet. App. at 4a, 38a).

The Seventh Circuit plainly conducted a *de novo* review in this case. It studied the evidence, and concluded that Petitioner simply failed to carry his burden of establishing a *prima facie* case of discrimination. FED. R. CIV. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, there is no requirement that the movant negate his opponent's claim. *Celotex Corp.*, 477 U.S. at 323. Once the moving party has met its initial burden, the nonmovant may not rest on conclusory allegations but instead must come forward with evidence demonstrating the existence of each element of its case upon which it would bear the burden of proof at trial. FED. R. CIV. P. 56(e). Evidence which is merely colorable or not significantly probative cannot defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

Petitioner's allegation that the Seventh Circuit failed to conduct an appropriate review is wrong. That court reviewed Petitioner's evidence regarding the existence of seventeen (17) allegedly similar employees. It noted that the district court "thoroughly and carefully analyzed all the issues raised in this appeal" and adopted the district court's order. (Pet. App. at 4a). The district court reviewed this evidence and concluded that "the similarities of which

[Petitioner] speaks relate only to his ability to teach, write, and research. The [Petitioner] has not shown similarities as to the status of these individuals or any detrimental conduct, similar to his own, that they were accused of." (Pet. App. at 35a). The district court carefully compared each of the seventeen current and former employees to Petitioner and concluded that none were comparable to Petitioner. (Pet. App. at 36a).

The appellate panel unanimously agreed with the district court's assessment of the evidence, noting that:

> [W]hile [Petitioner] points to 17 current and former members of the faculty as similarly situated, many of them were tenured professors. Due to their tenure, they were subject to a separate and entirely different means of oversight, making them dissimilarly situated. In other words, there was no evidence they were subject to the same standards for promotion and tenure as [Petitioner], nor was there any evidence the tenured professors were supervised by the same individuals. As for the remaining employees, there was simply too little evidence regarding their respective situations. For example, there was no evidence whatsoever the remaining employees were supervised by Utesch or had ever stood accused of the same or similar conduct as [Petitioner's]. Finally, [Petitioner] failed to explain when and how the non-tenured employees were treated more favorably than he.

(Pet. App. at 4a).

The appellate court conducted a proper *de novo* review in this case. The mere fact that it adopted the "thorough and careful" analysis of the district court does not indicate otherwise. Petitioner's bald statement that he "presented

abundant evidence, which raised numerous issues of material fact, that the Court of Appeals did not consider in the course of its *de novo* review," (Pet. at 10) is demonstrably false, and utterly unworthy of this Court's review.

II. The courts below properly applied *McDonnell Douglas*.

Petitioner argues that the courts below erred in concluding that Petitioner failed to establish the existence of similarly situated employees who were treated more favorably under the same or similar circumstances. (Pet. at 16). He contends that this failure creates a conflict among the circuits, and is contrary to this Court's precedent as articulated in *McDonnell Douglas* and *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). (Pet. at 16). Specifically, Petitioner claims that the "Seventh Circuit misapplied the appropriate standard" articulated by those cases by "holding that there was no evidence that other employees were accused of the same or similar conduct" as Petitioner was accused of (*i.e.* ineffective teaching and inappropriate classroom behavior). (Pet. at 16). Petitioner carries the burden of establishing the existence of similarly situated comparators. *McDonnell Douglas v. Green*, 411 U.S. 792, 804 (1973); *see also Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 258-59 ("*McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally.").

Petitioner feebly claims that the judgment below creates a conflict between the Seventh Circuit and the

First Circuit.[9] He claims that the First Circuit does not require that a plaintiff establish that allegedly comparable employees were accused of the same or similar conduct. He cites *Conward v. The Cambridge School Committee*, 171 F.3d 12 (1st Cir. 1999), as support for this argument.

Conward is not different from this case. It held that a Title VII plaintiff failed to establish the existence of similarly situated employees. *Id.* at 22. For example, the court noted that a white teacher accused of shoving a student was not comparable to an African-American teacher accused of sexual harassment. *Id.* at 21 ("The improper use of physical force, on one hand, and sexual harassment, on the other hand, are qualitatively different infractions.") The First Circuit noted that "in terms of comparative evidence, similarity, rather than identicality, provides the essential requirement for an analogy." *Id.* at 21-22. Still, the court found that the evidence offered by the plaintiff for comparison failed the test because he could not establish that others had been charged with the same or similar conduct. *Id.* at 22.

Petitioner's Title VII claim failed for the same reason in the proceedings below. Both courts concluded that Petitioner failed to establish that any of his proffered comparators were charged with the same or similar conduct as Petitioner. (Pet. App. at 4a). For example, he claimed that a faculty member was accused of plagiarism, but was retained by the University. (Pet. App. at 63a). The courts below each found plagiarism is not the same, or

[9] Petitioner actually claims that the judgment below conflicts with eight (8) other circuits. Respondent is unsure of Petitioner's basis for this allegation because he cites to only a single case from the First Circuit.

even arguably similar, to harassment, and that Petitioner failed to carry his burden of establishing the existence of a similarly situated employee who was treated more favorably than he was treated under the same or similar circumstances. (Pet. App. at 60a).

Just like the First Circuit in *Conward*, the Seventh Circuit holds that in order for a plaintiff to establish the existence of a similarly situated employee or "comparator," the plaintiff must show that both employees were subjected to the same standards, had the same supervisor, and engaged in similar conduct. *Bio v. Federal Express Corp.*, 424 F.3d 593, 597 (7th Cir. 2005); *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002-03 (7th Cir. 2004) (citing *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617 (7th Cir. 2000)). To successfully establish a comparator, the plaintiff must show that there is someone who is directly comparable to him in all material respects. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). A plaintiff's subjective beliefs alone cannot create triable issues of fact to preclude summary judgment. *See McMillian v. Svetanoff*, 878 F.2d 186, 190 (7th Cir. 1989); *see also Dandy v. United Parcel Service*, 388 F.3d 263, 273 (7th Cir. 2004) and *Hiatt v. Rockwell Intern. Corp.*, 26 F.3d 761, 771 (7th Cir. 1994).

The foregoing standards are fully consistent with the standards for similarity articulated by this Court. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274 (1976) (holding that decision to terminate employees who were charged with the same crime was a legitimate decision, but the criterion "must be 'applied alike to members of all races'"). The standards applied in this case are in harmony with other judicial circuits. *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) (confirming that a Title

VII plaintiff must establish the existence of comparators who are similar in all material respects); *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 359 (3d Cir. 1999) (holding that a similarity analysis should focus upon performance criteria and qualifications identified by the employer as its reasons for the adverse action); *Stanback v. Best Diversified Products, Inc.*, 180 F.3d 903, 910 (8th Cir. 1999) (when "different decision-makers are involved two decisions are rarely similarly situated in all relevant respects"); *Byrd v. Ronayne*, 61 F.3d 1026, 1033 (1st Cir. 1995) (noting that comparators must establish similarity of performance, qualifications and conduct); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995) (similarity means that all of the relevant aspects of the employment situation were nearly identical); *Mitchell v. Toledo Hospital*, 964 F.2d 577, 593 (6th Cir. 1992) (holding that similarity required the plaintiff to establish that he had the same supervisor, was subject to the same standards and exhibited the same conduct as the putative comparators).

Consistent with the foregoing standards, the courts below found that Petitioner's proffered comparators were different in three (3) material ways. First, Petitioner and the majority of the alleged comparators were not subject to the same standards for continued employment. (Pet. App. at 4a, 35a). Second, Petitioner and the majority of his proffered comparators did not report to the same supervisors. (Pet. App. at 4a, 35a). Third, there was no evidence that any of the proffered comparators were accused of even arguably similar conduct to Petitioner. (Pet. App. at 4a, 35a). Moreover, the Seventh Circuit noted that Petitioner "failed to explain when and how the non-tenured employees were treated more favorably than he." (Pet. App. at 4a).

The standards articulated in the Seventh Circuit were properly applied in this case. The judgment in this case is fully consistent with the precedent of this court. The proceedings below do not create a circuit split. This Court should deny the Petition.

III. Petitioner did not argue that an alleged violation of an internal policy permitted a favorable pretext inference, and the courts below did not resolve that question.

Petitioner devotes a good deal of his Petition to the question of whether he was entitled to a pretext inference based on his allegation that Respondent violated its internal policies and procedures. This question is not properly before this Court. First, as shown above, the courts below each concluded that Petitioner failed to establish a *prima facie* case of discrimination. (Pet. App. at 3a, 57a-63a). This conclusion requires the entry of summary judgment in Respondent's favor on Petitioner's Title VII claim. *McDonnell Douglas*, 450 U.S. at 802; *see also Burdine*, 450 U.S. at 254 n.7 (the phrase *prima facie case*, as used in *McDonnell Douglas* means "the establishment of a legally mandatory, rebuttable presumption"). Petitioner's inability to establish a *prima facie* case renders the *McDonnell Douglas* burden shift and pretext analysis unnecessary. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 n.3 (2003); *McDonnell Douglas*, 450 U.S. at 802.

Moreover, Petitioner never argued below that an alleged violation of an internal policy created an inference that Respondent's reasons for not reappointing Petitioner (*i.e.* his ineffective teaching and inappropriate behavior) were pretextual. As the district court noted, in response to Respondent's legitimate, non-discriminatory reason for its

decision, Petitioner "offer[ed] a two-paragraph rebuttal insisting that [Respondent's] stated reasons have no basis in fact." (Pet. App. at 64a). The district court found that Petitioner "failed to present enough evidence to cast the shadow of pretext on the [Respondent's] explanation why he was not reappointed." (Pet. App. at 64a).

Petitioner did not argue that a violation of a policy permitted a pretext inference, and neither court below addressed this question. Therefore, this Court should decline to review the question in this case. *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'") (citations omitted); *City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) ("[w]e ordinarily will not decide questions not raised or litigated in the lower courts").

Petitioner has presented no compelling reason for this Court to review the question of whether a violation of an internal policy creates a pretext inference. The Petitioner's failure to establish a *prima facie* case renders the pretext question unnecessary to sustain the judgments below. Moreover, the courts below did not address the question of an alleged policy violation because Petitioner did not make this argument in the proceedings below. Therefore, the question is not properly before this court.

IV. Respondent did not offer "after-acquired" evidence as support for its decision not to reappoint Petitioner, and the courts below did not consider "after-acquired" evidence in their Title VII analysis.

Petitioner correctly states that "Respondent's ultimate decision not to reappoint Petitioner was final prior" to the

filing of formal complaints of harassment against Petitioner by two graduate student employees.[10] (Pet. at 17). He claims the judgment below conflicts with precedent of this Court, and with the rulings of other federal circuits to the extent that the courts relied upon "after-acquired" evidence to support the entry of summary judgment. This question amounts to nothing more than a red herring, and this Court should not grant the Petition to review this issue.

Respondent did not rely upon evidence acquired after its decision not to reappoint Petitioner to support that decision. Rather, Respondent established that complaints received by Utesch and Wiener over two academic years prior to the decision proved Petitioner's failure to meet legitimate employment expectations. (Pet. App. at 30a-34a). Because Respondent offered no such evidence, neither court below addressed the issue of "after-acquired" evidence. Thus, this Court should not address the question of "after-acquired" evidence in this case. *Yeskey*, 524 U.S. at 212-13 (1998); *Kibbe*, 480 U.S. at 258.

Evidence of the University's investigation of the formal complaints were before the courts below because Petitioner claimed that the University's investigation evinced a conspiracy to deprive him of his civil rights, and because Petitioner claimed that the investigation established that Respondent negligently supervised and trained its employees, a claim sounding in tort under Indiana's common law. (Pet. App. at 30a-32a, 46a). Petitioner raised

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[10] His claim that both formal complaints were untimely is false. (Pet. App. at 18). Only Swinehart's complaint was filed after the 120-day time period expired. (*Id.*).

the issue in his Complaint, and never moved to strike or otherwise limit the Court's review of the evidence regarding the University's investigation. Most important, Petitioner simply has no basis to argue to this Court that either court below impermissibly relied upon "after-acquired" evidence.

Petitioner's fourth question is not properly before this Court. The Court should deny the Petition.

CONCLUSION

Petitioner has not established any compelling reason for the court to grant his Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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